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Supreme Court, U.S.
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No. 99-1995

In The
Supreme Court of the United States

ENVIROCARE OF TEXAS, INC; ENVIROCARE OF UTAH, INC; KHOSROW B. SEMNANI; CHARLES A. JUDD; FRANK C. THORLEY,

Petitioners,

v.

WASTE CONTROL SPECIALISTS, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents a peculiar instance in which a federal district court removed plaintiff's purely state law claim from Texas state court to federal court, based solely on the district court's evaluation of Texas law. That is, the sole basis for the exercise of federal jurisdiction was the district court's determination that plaintiff's state law claim was "not viable" under Texas law. In so holding, the district court at once denied plaintiff of both its chosen state court forum, and, because it had already deemed plaintiff's state law claim "not viable," its state law claim as well. Plaintiff therefore had no choice but to amend its complaint to allege a federal cause of action, lest it face the certainty of immediate dismissal in federal court. The unanimous court below correctly concluded that on such extraordinary facts, the district court's actions could not be sustained. For the reasons discussed below, this Court should deny *certiorari*.

STATEMENT OF THE CASE

On May 2, 1997, Plaintiff-Petitioners Waste Control Specialists ("WCS") sued Defendant-Respondents Envirocare of Texas, *et al.* ("Envirocare"), alleging only state law causes of action. In particular, WCS alleged that Envirocare had a monopoly in the business of disposal of low-level radioactive and mixed waste, and had used its monopoly position to prevent the State of Texas from approving WCS's bid to enter the market for low-level radioactive and mixed waste. In doing so, WCS alleged, Envirocare violated the Texas Free Enterprise Code and Antitrust Act of 1993, Tex. Bus. & Com. Code § 15.05(b) (1987) ("Texas Antitrust Act"), as well as the Texas common law of libel, slander, business disparagement, and tortious interference with prospective business relations. The parties engaged in extensive discovery while in state court, resulting in 44 depositions and the production by WCS of approximately 68,134 pages of documents, as well as the appointment of a special master to resolve discovery

disputes. On March 13, 1998, WCS amended its Original Petition; again, however, WCS alleged only violations of Texas antitrust and common law. Thereafter, on April 13, 1998, approximately ten months after WCS initially filed suit, Envirocare sought to remove this case to the United States District Court for the Western District of Texas pursuant to 28 U.S.C. § 1447(b).

WCS immediately filed a motion to remand the case to state court on the ground that its complaint alleged only violations of Texas law. The district court, however, denied this motion. The district court acknowledged that under the well-pleaded complaint rule, "the plaintiff is 'the master of his complaint,' " Pet. App. 47a (citation omitted), and further acknowledged that "[f]ederal antitrust law does not pre-empt Texas's antitrust law." Pet. App. 52a. Nevertheless, the district court held that under the Fifth Circuit's prior decision in *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995), it was obligated to deny the motion to remand if, in its view, plaintiff had "no legitimate or viable state cause of action, but only a federal claim." Pet. App. 48a. The district court then conducted a detailed analysis of Texas antitrust law, *see* Pet. App. 51a-56a, ultimately concluding that "the Texas Antitrust Act does not apply to Plaintiff's claims of anti-competitive behavior." Pet. App. 56a.[1] The district court emphasized that it was "not address[ing] the merits of the Plaintiff's federal antitrust claim, but only whether the Plaintiff ha[d] alleged a viable state antitrust claim." Pet. App. 56a n.8.

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[1] In so holding, the district court adopted the argument advanced by Envirocare in its opposition to WCS's motion to remand, wherein Envirocare asserted: "Here the only antitrust remedy available to WCS is federal, not because of federal preemption but because, under long-established *Texas* law, the Texas antitrust statute does not reach to exclusively interstate transactions – like those pled in WCS' First Amended Petition." Resp. App. 49a (emphasis in original).

The district court also held that Envirocare's notice of removal, filed ten months after the Original Petition, complied with the 30-day Rule set forth in 28 U.S.C. § 1446(b), pursuant to which a notice of removal must be filed within thirty days of receipt of a pleading "from which it may be first ascertained that the case . . . is or has become removable." The district court reasoned that it was only when WCS filed its First Amended Petition on March 13, 1998, that Envirocare was able to first ascertain that the case was removable; therefore, the notice of removal, filed within thirty days of the First Amended Petition, was timely filed. *See* Pet. App. 56a-57a.

In the face of a district court decision that both denied WCS its state court forum and rejected WCS's state law claims on their merits, WCS filed a Second Amended Complaint, wherein for the first time, it alleged violations of federal antitrust law. R. 1372-1421.

Thereafter, the district court granted Envirocare's Rule 12(b)(6) Motion to Dismiss the Second Amended Complaint. Pet. App. 14a-44a. The district court accorded WCS eleven days and ten pages to respond to this motion, and then held that both the state and federal claims were foreclosed by the *Noerr-Pennington* doctrine. Pet. App. 44a.

A unanimous panel of the Court of Appeals for the Fifth Circuit reversed the district court. Pet. App. 1a-13a. The court expressly declined to address the merits of WCS's claims, but instead, reversed the district court on the sole ground that removal was improper. Pet. App. 6a-7a.

The court first held that the district court erred in denying WCS's motion to remand the case, explaining that the district court's error rested on its erroneous "adoption of language in *Carpenter* to support its holding that the artful pleading doctrine could apply irrespective of the lack of complete preemption." Pet. App. 5a. The court explained that *Carpenter* was, by its terms, limited to instances where a state law claim was not viable *because it had been completely preempted by federal law. Carpenter* was

therefore inapplicable to the present case. Pet. App. 6a. The court thus concluded:

> In this circumstance, WCS remained master of its complaint. Although WCS *could* have alleged a federal cause of action in its state petition, it did not. It filed a complaint in state court alleging wholly state claims in a non-preempted field. Its choice is entitled to respect and precluded removing the case to federal court absent circumstances not presented here. For certain, we express no opinion as to the viability of WCS's state law claims. That is for a Texas court to decide. The district court's order, issued without jurisdiction, can have no preclusive effect.

Pet. App. 6a-7a (internal citation omitted).

The court also held that WCS had not waived its right to challenge the improper removal on appeal when, after the district court had deemed its state law claim "not viable," WCS filed a Second Amended Complaint alleging, for the first time, federal antitrust claims. Pet. App. 7a-11a. Applying the equitable test announced in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), the court concluded that "the doctrine of waiver after improper removal is not applicable on these facts." Pet. App. 11a. As the court explained, in *Caterpillar*, this "Court noted that the plaintiff, 'by timely moving for remand, did all that was required to preserve his objection to removal,' and held that a plaintiff in this predicament need not seek permission for a 28 U.S.C. § 1292(b) interlocutory appeal in order to preserve the error." Pet. App. 8a (internal citation omitted). Rather, "*Caterpillar* holds that timely objection can preserve the jurisdictional claim despite subsequent amendment, even if other considerations [*i.e.*, finality, efficiency, and economy] may ultimately outweigh that objection." Pet. App. 8a.

In this case, the Fifth Circuit concluded that "other considerations" did not outweigh WCS's properly preserved objection. In particular, the court noted that "[t]his case consumed, relatively, a minimum of judicial

resources," Pet. App. 11a, explaining that "in deciding that waiver is not applicable to WCS, [it was] greatly influenced because there was no trial on the merits," which it noted was at the opposite end of the procedural spectrum from a Rule 12(b)(6) dismissal. Pet. App. 9a-10a. In addition, the court noted that unlike *Caterpillar*, this was not a "diversity case" wherein "[t]here is no difference [between a federal and state court] in treatment of the substance of plaintiff's claims; the change is largely procedural if at all," Pet. App. 8a n.2 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)), and "f[ound] merit in . . . the narrowness of [WCS's] amendment," which "state[d] the one and only claim the district court suggested it had." *See* Pet. App. 11a n.5.

Accordingly, the court ordered that the district court's "orders are therefore VACATED, and the case is REMANDED to the district court with instructions to remand this action to the state court from which it was removed in accordance with 28 U.S.C. § 1447(c)." Pet. App. 13a.

The court below denied Envirocare's motion to stay its mandate, and Envirocare has not asked this Court to stay that mandate pending resolution of its petition for *certiorari*. Resp. App. 1a-3a. This case, therefore, has already been remanded to the Texas state court, Resp. App. 4a-6a, where proceedings are currently ongoing. Indeed, the Texas District Court of Andrews County, Texas, 109th Judicial District, has set this case to begin trial on November 27, 2000, at 9:00 a.m. Resp. App. 7a.

ARGUMENT

I. *Certiorari* Should Be Denied Because Substantial Jurisdictional Questions Preclude This Court From Addressing The Merits Of The Questions Presented.

Two separate and independent jurisdictional bars, which this Court is obliged to address, *see Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 94-95 (1998), prevent this Court from reaching the merits of the questions

presented. First, Envirocare did not comply with the 30-day Rule set forth in 28 U.S.C. § 1447(c), which, by its express terms, prohibits a federal court from taking removal jurisdiction of a case unless the notice of removal was filed within thirty days of a pleading from which the defendant could ascertain that the case was removable. Second, 28 U.S.C. § 1447(d) prohibits any review "by appeal or otherwise," including review by this Court, of an order remanding a case to a state court in accordance with 28 U.S.C. § 1447(c).

A. Envirocare Did Not Comply With The 30-Day Rule Of Section 1446(b).

Section 1446(b) states that a "notice of removal . . . *shall be filed* within thirty days after receipt . . . of the initial pleading" or, "[i]f the case stated by the initial pleading is not removable, . . . within thirty days after receipt . . . of an amended pleading . . . or other paper from which it may be first ascertained that the case . . . is or has become removable." 28 U.S.C. § 1446(b) (emphasis added).[2] Envirocare, by failing to file its notice of removal until ten months after WCS filed its Original Petition, plainly violated this 30-day Rule. Therefore, the district court and, consequently, this Court, lack jurisdiction of this case. *See Steel Co.*, 523 U.S. at 94-95.[3]

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[2] Prior to 1948, the predecessor to section 1446(b) did not contain a specified time period for filing a notice of removal, but simply provided that the petition for removal "*may* [be] ma[de] and file[d]" at a certain time. *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 100 (1898) (quoting Act of Mar. 3, 1887, c. 373, as corrected by Act of Aug. 13, 1888, c. 866, 25 Stat. 435) (emphasis added). This *discretionary authorization* in the predecessor statute (which was held to be merely " 'modal and formal,' " *id.* at 98 (citation omitted)), is obviously fundamentally distinct from section 1446(b)'s current *mandatory* deadline.

[3] Because the Fifth Circuit disposed of this case on what, in its view, was an alternative jurisdictional ground, *see* Pet. App.

This Court's decisions in *Schact v. United States*, 398 U.S. 58 (1970), and *Missouri v. Jenkins*, 495 U.S. 33 (1990), make clear that section 1446(b)'s 30-day Rule is jurisdictional. Under those cases, a filing deadline explicitly prescribed by statute is deemed a jurisdictional limit on the judicial power. In *Schact*, the Court held that the filing deadline prescribed by then Supreme Court Rule 22(2) was not jurisdictional, explaining that "it must be remembered that this rule was not enacted by Congress but was promulgated by this Court" and, therefore, could "be relaxed by the Court in the exercise of its discretion." *Schact*, 398 U.S. at 64. Justice Harlan, in a concurring opinion, expounded upon the difference between a court-created rule and a duly-enacted act of Congress, and more particularly, why the latter was jurisdictional but the former was not. "In the absence of language providing for waiver," he explained, "we have without exception treated the statutory limitations as jurisdictional." *Id.* at 65 (Harlan, J., concurring) (citing *Matton Steamboat v. Murphy*, 319 U.S. 412 (1943); *Dep't of Banking v. Pink*, 317 U.S. 264 (1942); *Citizens Bank v. Operman*, 249 U.S. 448 (1919)). He elaborated:

> As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional.

Id. at 68.

In accordance with *Schact*, this Court, in *Missouri v. Jenkins*, 495 U.S. 33 (1990), held that 28 U.S.C. § 2101(c) – which provides that an "appeal or any writ of *certiorari* to . . . the Supreme Court for review shall be taken or

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7a, it had no obligation to address whether Envirocare had satisfied section 1446(b)'s 30-day Rule. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 66-67 (1997).

applied for within ninety days after the entry of such judgment or decree" – "is mandatory and jurisdictional," and a court has "no authority to extend the period for filing except as Congress permits." 495 U.S. at 45. *See also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90, 99 (1994). *Cf. Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999) (Rehnquist, C. J., joined by Scalia and Thomas, J. J., dissenting) (referring to section 1446(b) as a "jurisdictional statute[ ]").[4]

In this case, the district court held that Envirocare could not ascertain the removability of this case from WCS's Original Petition, and so applied the 30-day Rule

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[4] Notwithstanding *Jenkins* and *Schact*, some lower federal courts have held that the 30-day Rule is not jurisdictional. *See, e.g., Northern Illinois Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212-13 (9th Cir. 1980). Even these courts, however, hold that the 30-day Rule "is a strictly applied rule of procedure and untimeliness is a ground for remand so long as the timeliness defect has not been waived." *Northern Illinois Gas Co.*, 676 F.2d at 273. *See also Fristoe*, 615 F.2d at 1212. Here, there is no argument that WCS waived or is estopped from raising Envirocare's failure to comply with the 30-day Rule, as it vigorously raised this objection both before the district court, *see* Plaintiff's Motion to Remand, R. 637-639; Pet. App. 56a-57a, as well as the court of appeals. *See* Brief of Appellant 25-38, No. 98-50952 (5th Cir. Dec. 23, 1998). Thus, even if it is not jurisdictional, the district court's violation of the 30-day Rule provides a compelling, threshold basis for denying removal here, and thus a significant obstacle to this Court reaching the merits of the questions presented by petitioners. In this regard, it should be noted that the district court's subsequent decision on the merits provides no basis for ignoring or excusing its failure to comply with the 30-day Rule. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42-43 (1998) (Distinguishing *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), this Court invalidated a full federal trial because the district court had, contrary to the mandate of 28 U.S.C. § 1407(a), refused to remand the case to another *federal* court).

only to WCS's First Amended Petition. This holding was clear error. Indeed, that Envirocare's basis for removal could be "ascertained" from the Original Petition is not even in dispute in this case, for Envirocare *did in fact ascertain in its Original Answer the very basis upon which it would, nine months later, seek to remove this case to federal court.*

Specifically, in its notice of removal, the sole basis upon which Envirocare asserted that this case was removable was that "Plaintiff's First Amended Petition states clearly for the first time that Plaintiff's allegations of antitrust violations *exclusively involve interstate commerce.*" Resp. App. 9a (emphasis added).[5] In its Original Answer filed on June 9, 1997, however, Envirocare explicitly acknowledged that it had *already ascertained* this very basis for removing the case:

> Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants violated the Texas Free Enterprise and Antitrust Act of 1983 for the reason that the Plaintiff has failed to properly allege a monopoly violation against the Defendants. *The disposal of low-level radioactive wastes and/or "mixed wastes" referred to in the Original Petition involve exclusively interstate commerce. Transactions which exclusively involve interstate commerce are not subject to Texas antitrust laws and instead are governed by the federal antitrust laws.* Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging an actionable violation of the Texas Free Enterprise and Antitrust Act of 1983 against the Defendants.

Resp. App. 15a (emphasis added).

In short, Envirocare did, on the basis of WCS's *Original* Petition, in fact "ascertain[ ] that th[is] case is one

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[5] This was likewise the basis upon which the district court sustained the removal. *See* Pet. App. 55a-56a.

which is or has become removable." 28 U.S.C. § 1446(b). Accordingly, Envirocare's notice of removal, filed ten months after WCS filed its Original Petition, was filed out of time and, therefore, this Court has no jurisdiction to reach the merits of the questions presented.

B. Section 1447(d) Precludes This Court From Reviewing The Fifth Circuit's Order Remanding This Case To State Court.

Pursuant to the Fifth Circuit's mandate, this case has already been remanded to state court, where a November 27, 2000, trial date has been set. A decision to grant review in this case would therefore entail the necessity of staying an ongoing state court proceeding and removing the action to federal court. Envirocare has not explained the procedure by which such a stay could be entered. Moreover, any such action would seem to be inconsistent with the principles of *Younger v. Harris*, 401 U.S. 37 (1971). *See id.* at 45 ("the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions"). By failing to seek from this Court an immediate stay of the remand order, Envirocare has made any review by this Court impossible without confronting the significant federalism issues raised by intervening in ongoing state court litigation. This alone constitutes a reason for denying the writ.

It is perhaps for these reasons that Congress, in enacting 28 U.S.C. § 1447(d), specifically precluded *any* review, "on appeal or otherwise," of *any* "order remanding a case to the State court from which it was removed."[6] Section

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[6] Section 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise*, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). Section 1443, which refers to removal in civil rights cases, is not applicable to the present case.

1447(d) is as applicable to this Court as it is to a court of appeals.[7] Nothing in the text of the statute limits the proscription on review to orders issued by district (as opposed to appellate) courts. The statute's proscription, moreover, is complete, extending to all review "on appeal *or otherwise*." 28 U.S.C. § 1447(d) (emphasis added).[8] *See*

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[7] *Cf. Volvo of Am. Corp. v. Schwarzer*, 429 U.S. 1331 (1976) (Rehnquist, Circuit Justice) (denying stay of district court remand order because review of the order is barred by section 1447(d)); *Ex Parte Matthew Addy S.S. Commerce Corp.*, 256 U.S. 417, 418-19 (1921) (predecessor of section 1447(d) barred Supreme Court from reviewing remand order on petition for writ of *mandamus*); *In re Pennsylvania Co.*, 137 U.S. 451, 453-54 (1890) (same).

[8] Section 1447(d)'s predecessor statute was held not to bar Supreme Court review by writ of *certiorari*. *See Gay v. Ruff*, 292 U.S. 25, 28-30 (1934); *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947). Unlike section 1447(d), however, that predecessor statute barred only review by " 'appeal or writ of error.' " *See Gay*, 292 U.S. at 28 (quoting Judicial Code § 28). This distinction is crucial because, as *Gay* explained, the Circuit Court of Appeals Act of 1891 had granted the Court the power to review by *certiorari* decisions that had not reached final judgment, *see Gay*, 292 U.S. at 30 – that is, decisions that could not be reviewed by appeal or writ of error. *See German Nat'l Bank v. Speckert*, 181 U.S. 405, 409 (1901). *Certiorari* review, therefore, provided a separate basis for reviewing the court of appeals' remand. In 1948, however, immediately after *Aetna* summarily reaffirmed the holding of *Gay*, Congress enacted the broad language of section 1447(d), extending the statutory proscription to *any* review "on appeal *or otherwise*," 28 U.S.C. § 1447(d) (emphasis added) – thus clarifying that the statute barred review by writ of *certiorari*, as well as by appeal or writ of error. In addition, whereas the predecessor statute barred review only of " 'the decision of the district court so remanding,' " *Gay*, 292 U.S. at 28 (quoting Judicial Code § 28), section 1447(d) bars review of *any* "order remanding a case to the State court from which it was removed," 28 U.S.C. § 1447(d), including review by this Court of an order issued by a court of appeals.

Thermatron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976) ("There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, Congress immunized from all form of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court."). Indeed, this case is the quintessential example of the evil section 1447(d) was designed to prevent since the Court would have to further delay a pending state court trial in order to resolve the already "protracted litigation of jurisdictional issues." *Id.*[9]

Here, the court below issued an order that this case be remanded to the state court from which it was removed, Pet. App. 13a, and in accordance with this order, this case has been remanded to the state court where it is currently being litigated. Resp. App. 4a-7a. Accordingly, section 1447(d) precludes this Court from reviewing "on appeal or otherwise" the court's order remanding this case to state court.[10]

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[9] This Court has reviewed cases in a procedural posture similar to this, *i.e.*, where the court of appeals reversed the district court's denial of a plaintiff's motion to remand. *See, e.g., Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). However, the Court never confronted the propriety of doing so in light of section 1447(d), and has "repeatedly held that the existence of unaddressed jurisdictional defects ha[ve] no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 353 n.2 (1996).

[10] Section 1447(d) does not insulate from this Court's review all lower court decisions interpreting the remand statutes, for this Court retains unfettered authority to review appellate court decisions affirming a district court's denial of a motion to remand, as this Court has done on numerous occasions. *See, e.g., Rivet v. Regions Bank*, 522 U.S. 470, 473-74 (1998).

II. The Court Of Appeals' Conclusion That Removal Was Improper On The Unique Facts Of This Case Is Not Worthy Of This Court's Review.

Even assuming the substantial jurisdictional and procedural problems with this case were resolved in petitioner's favor, the case is not worthy of this Court's review on the merits. Contrary to the petition's misleading characterization (as we further explain below), the court below did not opine or suggest that a state law claim which embodies a "substantial-federal-question" could not be removed, for the simple reason that this issue was not before the court since no one contended that WCS's antitrust claim required the court to resolve any federal law issues. Thus, the court below discussed only the "complete preemption" exception to the well-pleaded complaint rule simply because that was the only exception potentially implicated by the case – not because it was *sub silentio* rejecting another possible exception. Specifically, the district court here believed it could remove a state law claim that was not "viable" because it had no merit under state law, but the Fifth Circuit correctly held that courts can remove only state claims that are rendered not "viable" because they are *completely preempted* by federal law. No inferior appellate court disagrees with the Fifth Circuit's holding or reasoning; no federal appellate court has otherwise articulated any rule which authorized removal in this case and there is no split among the federal courts on the vitality of the "substantial-federal-question" exception after *Rivet* – even if that question were presented here. We will examine each point in turn.

1. The district court here removed a purely state antitrust claim to federal court on the grounds that "the Plaintiff has not adequately alleged a *Texas* antitrust action" because, as the "*Texas* Supreme Court has long recognized," the "*Texas* antitrust statutes do not apply to actions that are wholly interstate in nature." Pet. App. 54a, 52a (emphases added). Thus, under the district court's astonishing reasoning, a federal court may take a purely state law claim from state court if, under state law, it

believes the plaintiff fails to state a claim on the merits. There is, of course, no support or logic for the notion that a federal court may remove a purely state law claim if it determines that the claim is not "viable" because there is no merit to it under state law. Pet. App. 50a, 56a n.8. Rather, it may remove a state law claim if the claim is not viable because it has been completely preempted by federal law. In certain circumstances, the "pre-emptive force of [federal law] is so powerful as to displace entirely any state cause of action." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). In these rare cases, then, "any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Rivet v. Regions Bank*, 522 U.S. 470, 476 (1998). Here, it was and is undisputed that federal antitrust law does not completely preempt state antitrust laws, so this doctrine is wholly inapplicable. *See* Pet. 12; Pet. App. 4a, 52a.

Nevertheless, the district court, misinterpreting scattered phrases from complete preemption cases, created a new and facially erroneous removal doctrine – removal is authorized if a state law cause of action fails to state a meritorious claim under state law. The Fifth Circuit simply corrected this obvious error. Citing *Rivet* and other previous cases, the court below held that it was wrong for the district court to opine on the "viability of WCS's allegations . . . [w]ithout complete preemption" because "the viability of WCS's state law claims . . . is for a Texas court to decide." Pet. App. 4a, 7a. The only question for the federal court is whether the viability of the state law claim has been eliminated through complete preemption. There is nothing remotely controversial or questionable about this plainly correct decision.

Apparently recognizing this, petitioners struggle mightily to recast the decision below as somehow rejecting a ground for removal other than complete preemption – *i.e.*, the "substantial-federal-question" exception – which, petitioner maintains, continues to be recognized by other lower courts, and in an article by Professor Arthur Miller,

as viable after this Court's *Rivet* decision. Pet. 13-18. But petitioner's basic premise is facially erroneous: The court below did not reject removal of state law claims which necessarily require resolution of "substantial-federal-questions." It did not do so for the obvious reason that this issue was neither presented nor argued. There is no federal question embedded in WCS's state law claim and no one has ever argued that there was.

A brief analysis of petitioner's argument is necessary to demonstrate how it seeks to present an issue that was not ruled upon by the court below and is not implicated by this case. The basic thrust of the petition is that, according to Professor Miller, removal is appropriate in "three distinct classes of cases," not just in cases involving complete preemption of state law. Pet. 16 (quoting 14b Wright, Miller and Cooper § 3722, at 436). *See also* A. Miller, *"Artful Pleading: A Doctrine in Search of a Definition,"* 76 TEX. L. REV. 1781, 1784 (1998). Specifically, Professor Miller's article states:

> The Supreme Court has recognized three separate categories of cases in which federal courts may deviate from the well-pleaded complaint rule: substantial-federal-question cases, complete preemption cases, and a rather amorphous category apparently based on notions of federal claim preclusion, relevant only to removal jurisdiction and developed by a number of courts of appeals pursuant to the Supreme Court's decision in *Federated Department Stores Inc. v. Moitie.*

Arthur R. Miller, *Artful Pleading: A Doctrine In Search Of A Definition*, 76 TEX. L. REV. 1781, 1784 (footnote omitted). It is incontrovertible that the third exception referenced – the "*Moitie* footnote two exception" – was eliminated by this Court's decision in *Rivet*, leaving only the "complete preemption" and "substantial-federal-question" exceptions. Since the court below explicitly acknowledged the "complete preemption" exception, it *must* be Envirocare's argument that the court below somehow eliminated the "substantial-federal-question" exceptior

The "substantial-federal-question" exception to the well-pleaded complaint rule arises where a plaintiff's ostensibly state-law cause of action has, as an essential element, a substantial issue of federal law.[11] Here, the court below never so much as mentioned the "substantial-federal-question" exception, much less held that the exception no longer existed. As noted, this is because Envirocare could not and did not argue its applicability. Thus, this case does not present a vehicle for addressing the continued existence or scope of this exception.

Indeed, nowhere in the many pleadings, orders, and opinions that form the record in this case, does any party or any court so much as cite this Court's decisions in *Smith*, *Merrell Dow*, or *Moore*, *see supra* note 11, or any other decision arguably within the "substantial-federal-question" line of cases. Rather, in their briefs before the court below, the *only* argument that Envirocare advanced was that removal was proper because, under the Texas courts' interpretation of the Texas Antitrust Act, WCS's state law antitrust claim was "no[t] viable," Resp. App. 36a, and, accordingly, this was the *only* argument that the court below had occasion to address. *See* Pet. App. 4a-7a.

Nor can it plausibly be argued that WCS's state antitrust claim would fall within the "substantial-federal-

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[11] *ARCO Envtl. Remediation v. Dep't of Health & Env't Quality*, 213 F.3d 1108, 1116 (9th Cir. 2000) ("federal jurisdiction may still lie if 'it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims' "). *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 805 (1986) (rejecting removability of state-law products liability suit that alleged "that the drug Bendectin was 'misbranded' in violation of the Federal Food, Drug, and Cosmetic Act"); *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214-15 (1934) (rejecting federal question jurisdiction of state law personal injury action alleging that plaintiff's injury was caused by defendant's failure to comply with the Federal Safety Appliance Act).

question" exception even had Envirocare made this argument. Here, WCS's state law antitrust claim is totally independent of federal law: it stands or falls completely on the application of Texas state law, as the district court's evaluation as to its "viability" makes abundantly clear. *See* Pet. App. 51a-56a.

In short, this case cannot provide a vehicle for addressing the question presented: the "substantial-federal-question" exception to the well-pleaded complaint rule was not raised or addressed in the courts below and is inapplicable to this case.

2. In any event, contrary to Envirocare's assertion, there is no circuit split as to the continued existence of the "substantial-federal-question" exception to the well-pleaded complaint rule; every court that has addressed the issue has held that it exists. The cases that Envirocare believe reject its existence do not do so, but rather, like the court below, simply do not address the issue.

Envirocare cites three circuit court cases that, in its view, are inconsistent with the court decision below, *see* Pet. 17 & n.3 – two from the Ninth Circuit, and one from the Second Circuit.[12] It also cites two circuit court cases that are consistent with the court below, *see* Pet. at 17 n.4, and, presumably, inconsistent with the Second and Ninth Circuit decisions cited above – one from the Third Circuit, and one from the Eighth Circuit.[13] These decisions, however, are fully consistent with one another and with the court's decision below for three separate reasons.

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[12] *See ARCO Envtl. Remediation*, 213 F.3d at 1113-14; *Desaigoudar v. California Micro Devices Corp.*, No. 98-15116, 1999 U.S. App. LEXIS 1067 (9th Cir. Jan. 22, 1998) (unpublished memorandum); *Fax Telecommunicationes, Inc. v. AT&T*, 138 F.3d 479, 486-87 (2d Cir. 1998).

[13] *See Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 311-12 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608, 612 (8th Cir. 1991).

First, and most importantly, *none* of these decisions *reject* the existence of the "substantial-federal-question" exception to the well-pleaded complaint rule.[14] As in the case below, neither *Goepel* nor *M. Nahas* even addressed, much less resolved, this question. In *M. Nahas*, the Eighth Circuit *sustained* the removal, reasoning that the plaintiff's purportedly state law claim had been completely preempted by federal law. *See M. Nahas*, 930 F.2d at 612. The Eighth Circuit court therefore had no cause to opine on the applicability or existence of the "substantial-federal-question" exception. Likewise, in *Goepel*, the Third Circuit merely held that removal was improper because plaintiffs' New Jersey statutory and contract claims were not "completely preempted" by federal law. *See Goepel*, 36 F.3d at 314. The court did not address the "substantial-federal-question" exception, much less whether it would have provided an alternative basis for removal.[15] Because neither *Goepel* nor *M. Nahas* even addressed the existence of the "substantial-federal-question" exception, they are not at all inconsistent with *ARCO*, *Desaigoudar*, and *Fax*, which do acknowledge its existence (though, as discussed below, none apply it).[16]

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[14] This is equally true of the district court decisions cited in footnote 4 of Envirocare's petition. Pet. 17 n.4. Indeed, one of these decisions, *XF Enterprises, Inc. v. BASF Corp.*, No. 99-3693, 1999 U.S. Dist. LEXIS 16834, at *6-7, 10 n.3 (E.D. Pa. Nov. 2, 1999), expressly acknowledges its existence.

[15] While there is dictum in *Goepel* that could be read to suggest that complete preemption is the only valid ground for removal, *see* 36 F.3d at 311-12, the Third Circuit did not purport to analyze or resolve this question. Not surprisingly, lower courts in the Third Circuit have not read *Goepel* as passing on this issue. *See, e.g., XF Enters., Inc.*, 1999 U.S. Dist. LEXIS 16834, at *10 n.3 ("The court does not read *Goepel* as eliminating removal based upon a substantial-federal-question.").

[16] *See ARCO*, 213 F.3d at 1114; *Desaigoudar*, 1999 U.S. App. LEXIS 1067, at *4; *Fax Telecommunicationes*, 138 F.3d at 486-87.

Second, *all* of these cases are consistent with the court below's resolution of the issue it did address – that is, whether a case can be removed from state to federal court solely because a plaintiff's state law claim is "not viable" – since *none* of these cases even mention, much less accept, this argument. Indeed, the Ninth Circuit's decision in *Desaigoudar*, which Envirocare believes *supports* its view of the law, explicitly rejects the argument that it advanced in the courts below. In *Desaigoudar*, "[i]n an effort to shore up their position, Defendants also argue[d] that Desaiguador's third cause of action, as pleaded, does not adequately state a claim under California law." *Desaigoudar*, 1999 U.S. App. LEXIS 1067, at *6 n.3. The Ninth Circuit dismissed this argument out of hand, stating that "it is enough to simply note that by pleading a state cause of action poorly, a plaintiff does not forfeit her right to a state court forum, nor does she transmogrify her cause of action into a federal one." *Id.*

Indeed, the *only* cases that Envirocare cites as supportive of this theory, set forth in footnotes 2 and 3 of the petition, Pet. 15 n.2, 17 n.3, are district court decisions, several of which were reversed on appeal. All of the district court decisions in footnote 2 of the petition, however, either explicitly rely on *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), footnote two[17] – the reasoning of which was explicitly rejected by this Court in *Rivet* – or, worse still, are the very decisions cited in *Moitie*

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[17] *See In re NASDAQ Market-Makers Antitrust Litig.*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996); *Mech. Rubber & Supply Co. v. Am. Saw & Mfg. Co.*, 747 F. Supp. 1292, 1294-95, *vacated in part*, 810 F. Supp. 986 (C.D. Ill. 1990); *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, No. 86-1190-Y, 1986 U.S. Dist. LEXIS 17085, at *6 (D. Mass. Dec. 1, 1986), *vacated and remanded*, 834 F.2d 208, 217 n.4 (1st Cir. 1987); *Buchanan v. Delaware Valley News*, 571 F. Supp. 868, 871 (E.D. Pa. 1983).

footnote two.[18] The decisions cited in footnote 3 of the petition suffer from the same flaw[19] or are irrelevant because they address either the propriety of removal under diversity jurisdiction,[20] complete preemption,[21] or the "substantial-federal-question" exception.[22] None of these decisions even arguably support the novel theory advanced by Envirocare below, *viz.*, that removal is appropriate where a plaintiff's state law claim is "not viable" as a matter of state law.[23]

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[18] *See In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980); *Three J Farms, Inc. v. Alton Box Bd. Co.*, No. 78-1257, 1978 U.S. Dist. LEXIS 14134 (D.S.C. Nov. 29, 1978), *rev'd*, 609 F.2d 112 (4th Cir. 1979); *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (N.D.N.Y. 1964).

[19] *See Temptations, Inc. v. Wager*, 26 F. Supp. 2d 740, 743-44 (D.N.J. 1998).

[20] *See Kobaissi v. Am. Country Ins. Co.*, 80 F. Supp. 2d 488, 489 (E.D. Pa. 2000).

[21] *See Reynolds v. Fergusson*, 73 F. Supp. 2d 841, 843-44 (W.D. Mich. 1999); *Archer v. Arms Tech., Inc.*, 72 F. Supp. 2d 784, 786-88 (E.D. Mich. 1999).

[22] *See Lowe v. NASD Regulation, Inc.*, No. 99-1751, 1999 U.S. Dist. LEXIS 19489, at *9-11 (D.D.C. Dec. 14, 1999); *Servia-Mendoza v. Burgos*, 31 F. Supp. 2d 35, 39-40 (D.P.R. 1998); *Popular Democratic Party v. Puerto Rico*, 24 F. Supp. 2d 184, 188-90, 195 (D.P.R. 1998); *Portage County Bd. of Comm'rs v. City of Akron*, 12 F. Supp. 2d 693, 703 (N.D. Ohio 1998); *Case v. Webb*, No. 98-10064-CIV, 1998 U.S. Dist. LEXIS 21679, at *11 (S.D. Fla. Dec. 8, 1998); *Westwood Nursing Ctr. v. Haveman*, No. 98-CV-74023-DT, 1998 U.S. Dist. LEXIS 20584, at *4-6 (E.D. Mich. Dec. 3, 1998); *Village of Alden v. Cablevision Indus.*, No. 98-CV-325S(H), 1998 U.S. Dist. LEXIS 20339, at *11-12 (W.D.N.Y. Oct. 26, 1998).

[23] Only three district court cases cited in footnote 3 of the petition even arguably support Envirocare's theory. *See Caravanas v. Hall*, No. 99-1405, 1999 U.S. Dist. LEXIS 12741, at *2-6 (E.D. La. Aug. 10, 1999); *Schappel v. UICI*, No. 3:99-CV-1544-G, 1999 U.S. Dist. LEXIS 19444, at *7-8 (N.D. Tex. Dec. 3, 1999); *Baron v. Strassner*, 7 F. Supp. 2d 871, 874-76 (S.D. Tex. 1998). All

Third, in *none* of the circuit court cases cited by Envirocare would the "substantial-federal-question" exception have been applicable, and so the holdings of these cases are all fully consistent with one another.[24] In other words, under the reasoning of any of these cases, including the case *sub judice*, the outcomes would remain unchanged. With respect to the cases that did explicitly reference the exception – *ARCO*, *Desaigoudar*, and *Fax* – all three concluded that removal was improper; they therefore obviously found the "substantial-federal-question" exception inapplicable to the facts presented.[25]

In *M. Nahas*, the "complete preemption" exception provided a basis for removal and, therefore, resort to the "substantial-federal-question" exception was wholly unnecessary. *See M. Nahas*, 930 F.2d at 612. And finally, with respect to *Goepel*, although the court did not expressly address the "substantial-federal-question" exception, its discussion of the complaint makes clear that all of the plaintiff's claims were based exclusively on New Jersey statutes or common law. 36 F.3d at 309.

Although petitioner principally relies on the Ninth Circuit's decision in *ARCO*, that decision neither conflicts with the decision below nor supports Envirocare's theory

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three of these cases, however, are in the Fifth Circuit; they therefore are no longer good law, for they are now governed by the decision below, which has unequivocally rejected Envirocare's theory of removal.

[24] The same is true of the district court cases cited in footnote 4 of the petition. Pet. 17 n.4.

[25] Although the Second Circuit in *Fax* ultimately sustained the district court's denial of the plaintiff's motion to remand, it did so because it concluded that the plaintiff had waived his objection to removal by not objecting to it. *See Fax Telecommunicationes*, 138 F.3d at 487. The Second Circuit, however, was quite clear that "[t]he district court . . . erred when it took jurisdiction over the case" and that "if Fax had objected to removal in the district court, we would vacate the judgment and remand with instructions to return the case to state court." *Id.*

of removal. First, *ARCO* merely acknowledges the existence of the "substantial-federal-question" exception.[26] This hardly conflicts with the decision below, which is completely silent on the subject. Moreover, the "substantial-federal-question" exception, as articulated in *ARCO* (or anywhere else), does not support removal in this case for here, as in *ARCO*, federal law is "not an element" of the state law cause of action. 213 F.3d at 1116. Nor does *ARCO* otherwise remotely endorse the "not viable state law claim" theory advanced by petitioner and embraced by the district court.

In short, all of the circuit court cases that Envirocare cites are consistent with one another; none accept the *only* reasoning upon which removal in this case could be sustained, *viz.*, that removal is proper simply because a plaintiff's state law claim is "not viable" under applicable state law; and at least one case explicitly rejects that reasoning. Every court that has addressed the "substantial-federal-question" exception issue agrees that it exists. And the decisions that Envirocare believes are to the contrary, including this one, simply did not address the issue. Accordingly, this case is not worthy of *certiorari*. *See* Sup. Ct. Rule 10(a).

3. Finally, as this complete absence of support reflects, the court below was clearly correct on the issue that it did address. Federal courts have no more authority

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[26] The Ninth Circuit also recognized a third exception, "where the claim is necessarily federal in character." *See ARCO*, 213 F.3d at 1114, 1115-16. This, however, is a special exception limited to federal statutes that – like the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.* – contain "specific statutory language authorizing *exclusive federal jurisdiction*" over certain causes of action. *ARCO*, 213 F.3d 116 (citing *Brennan v. Southwest Airlines*, 134 F.3d 1405 (9th Cir. 1998)) (emphasis added).

or justification to remove nonmeritorious state law claims than they do to remove meritorious ones.

III. The Court Should Deny *Certiorari* On The Waiver Issue.

Nor should the Court grant *certiorari* to resolve the inherently fact-bound question whether the court below correctly applied the equitable balancing test set forth in this Court's unanimous decision in *Caterpillar*. *Caterpillar* held that, in certain circumstances, a plaintiff's meritorious objection to removal can nonetheless be ignored where, at the time of judgment, a district court has subject matter jurisdiction. *See* 519 U.S. at 73-78. *Caterpillar* involved an instance where diversity jurisdiction, lacking at the time of removal, existed at the time of judgment. *See id.* at 70. The holding and reasoning of the court below does not conflict with *Caterpillar* or any lower court's interpretation of *Caterpillar* and, in any event, does not present an appropriate vehicle for resolving any ambiguity that may remain in the wake of *Caterpillar*.

As an initial, and dispositive, matter, this case cannot possibly provide any general guidance on the circumstances in which it is permissible to overlook an improper removal on the grounds that the court has jurisdiction at the time of judgment. Rather, this case presents a unique and bizarre factual scenario that is created only by virtue of the district court's initially erroneous conclusion that removal is proper because the state law claim had no merit under state law. Since removal was justified on the ground that the state law claim was without merit, the district court, when removing the case, necessarily simultaneously decided that it would dismiss the state law claim that WCS sought to pursue. Thus, the removal decision simultaneously deprived respondent of both its state court forum and the possibility of pursuing a state law claim in the federal forum. In these unique circumstances, WCS could either add the *federal* antitrust claim – "the one and only claim the district court suggested it had," Pet. App.

11a n.5 – or lose its case on the merits. Accordingly, the action allegedly creating federal jurisdiction after removal – adding the federal antitrust claim – was plainly forced on WCS by the district court: it either added the claim or lost the case. No other plaintiff removed to federal court has ever faced such an insoluble dilemma since, as noted, no other appellate court has granted removal on the ground that the state law claim was not "viable" under state law. Thus, the decision below cannot conflict with *Caterpillar* or any other removal case, since in those other cases plaintiffs always had the opportunity to have their state law claim heard on the merits by the federal court.

Equally important, WCS's decision to add the federal claim cannot be fairly characterized as "voluntary" and no fair balancing of the equities would retroactively justify the district court's improper – and properly objected to – removal on the grounds that WCS added a federal claim. Accordingly, the Court's resolution of this case cannot clarify whatever ambiguity exists in federal courts concerning the circumstances in which *Caterpillar* authorizes or requires tolerating improper removal because the federal court possessed jurisdiction at the time of judgment. Moreover, as we discuss below, the court's application of *Caterpillar* to these extraordinary facts was undoubtedly correct and, in any event, the circuit split that Envirocare alleges is illusory.

1. Envirocare's argument that the Fifth Circuit's decision is somehow inconsistent with *Caterpillar* is predicated both on a misreading of *Caterpillar* and the decision below. *Caterpillar* did not hold that a properly preserved objection to removal was waived whenever "post-removal events have occurred that confer jurisdiction on the federal court," Pet. 19; indeed, it held precisely to the contrary. *See Caterpillar*, 519 U.S. at 73-74. Rather, as the court below correctly explained, *Caterpillar* held that a "timely objection can preserve the jurisdictional claim . . . , even if other considerations" – *i.e.*, "finality, efficiency, and economy" – "may ultimately outweigh that objection." Pet. App. 8a. In other words, *Caterpillar* recognized an equitable exception

to the general rule that lack of jurisdiction at the time of removal is fatal to all that follows in federal court. Faithfully applying *Caterpillar*'s legal standard to the facts of this case, the court below merely held that on the facts presented, considerations of "finality, efficiency, and economy" did not outweigh WCS's properly preserved objection to the district court's removal.

In *Caterpillar*, this Court held that the "district court's error in failing to remand a case improperly removed is *not fatal* to the ensuing adjudication," 519 U.S. at 64 (emphasis added) – in other words, that such error did not *automatically result* in invalidation of the jury verdict. Rather, it explained that it would examine certain factors to determine whether the district court's judgment could stand notwithstanding the improper removal.

Most important is whether the plaintiff has properly preserved the objection. If not, then the objection to removal is waived, pursuant to *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), and *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972). *See Caterpillar*, 519 U.S. at 72. This Court explained, however, that "neither [*Finn* nor *Grubb*] resolves dispositively a controversy . . . involv[ing] a plaintiff who moved promptly, but unsuccessfully, to remand a case improperly removed from state court to federal court, and then challenged on appeal a judgment entered by the federal court." *Caterpillar*, 519 U.S. at 70-71. Rather, where, as here, a plaintiff properly preserves his objection to removal, that objection to the erroneous removal is *not* waived even if the district court subsequently acquires subject matter jurisdiction of the case. Such a plaintiff, "by timely moving for remand, did all that was required to preserve his objection to removal," and "is [not] . . . required to seek permission to take an interlocutory appeal . . . in order to avoid waiving whatever ultimate right of appeal he may have." *Id.* at 74.

Nevertheless, the Court held, a plaintiff's properly preserved objection to removal could be overcome by consideration of certain equitable factors – that is, the district

court's original error was "not fatal" to its ensuing adjudication on the merits. *Id.* at 64. As the Court explained, "once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75. *Caterpillar* was a diversity case, where the defendant has a statutory right to have a state law claim adjudicated by a federal court, *see id.* at 75, where the federal litigation already had proceeded for three-and-one-half years including a six-day jury trial, *see id.* at 65-67, and where any retrial in state court would involve precisely the same state law issues already adjudicated. For these compelling reasons, this Court found that "[t]o wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77.

There can be no doubt that the court below properly applied *Caterpillar* to the facts of this case. In contrast to *Caterpillar*'s three-and-one-half years of federal litigation culminating in a six-day jury trial, this case spent a total of four months before the federal district court and was resolved on the pleadings pursuant to Rule 12(b)(6). The only federal litigation, aside from the removal question itself, was Envirocare's Rule 12(b)(6) motion, to which WCS had just eleven days to respond. *See* Pet. App. 11a. This case, moreover, did not involve diversity jurisdiction, pursuant to which the same state law is applied to a plaintiff's state law claim regardless of which forum is selected. Rather, in this case, the district court *compelled* WCS to plead a federal cause of action in order to have a case at all. *See* Pet. App. 8a n.2. Finally, it must be emphasized that this case is *currently being litigated in state court*, and, indeed, a state court trial date has already been set. On these facts, there is no doubt but that pursuant to *Caterpillar*'s equitable factors of "finality, efficiency, and

economy," this case should remain where it currently is – in Texas state court.

Notwithstanding Envirocare's fulminations to the contrary, the rule enunciated by *Caterpillar*, and applied below, is not "illogic[al]" or "perverse." Pet. 27. Indeed, the test is eminently logical. *Caterpillar* confronted a dilemma posed by a properly preserved statutory objection, on the one hand, and the need to preserve scarce judicial resources on the other. This Court, therefore, crafted a standard pursuant to which these competing interests could be weighed. And it held that in a diversity jurisdiction case in which enormous amounts of federal judicial resources had already been consumed, the balance weighed decisively in favor of preserving the federal jury verdict, albeit at the admitted cost of the plaintiff's properly preserved and meritorious statutory objection. The same simply cannot be said of the present case.[27]

2. Envirocare argues that the court below announced a *per se* rule that whenever an improperly removed case has been decided pursuant to Rule 12(b)(6), the appellate court *must* reverse the district court's decision and remand the case to state court. *See* Pet. 21. This assertion, moreover, is the

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[27] Envirocare argues that the interest in preserving the district court's judgment in this case is no different than in a diversity case because "the federal District Court would assess the First Amendment principles underlying the *Noerr-Pennington* doctrine in the same manner as would the state court." Pet. 25. It would be directly contrary to the basic rationale of the well-pleaded complaint rule, however, to allow a federal court to ignore a properly preserved objection to federal question removal on the ground that the defendant could assert the same federal defense in both state and federal court. For the well-pleaded complaint rule rests on the basic principle that " 'a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.' " *Rivet*, 522 U.S. at 475 (citation omitted).

precise basis upon which Envirocare alleges that the circuits are split: "there is a conflict in the Circuit Courts as to the proper outcome when the 'ensuing adjudication' to which *Caterpillar* refers is made pursuant to a motion to dismiss." *See* Pet. 21-22 (citing cases).

As the forgoing discussion makes clear, the court below adopted no such *per se* rule. Rather, the fact that the federal litigation consumed few federal judicial resources was but one of several factors – albeit an important one – considered by the court in applying *Caterpillar*'s equitable test. In addition to considering the fact that "[t]his case consumed, relatively, a minimum of judicial resources," Pet. App. 11a, the court considered the fact that this was not a diversity case, *see* Pet. App. 8a n.2, and "the narrowness" of WCS's amendment, which reflected "the one and only claim the district court suggested it had." *See* Pet. App. 11a n.5.

In any event, the alleged circuit split on this issue is completely contrived. Envirocare argues that the Second and Sixth Circuits have held that a properly preserved objection to removal is waived or mooted where the federal litigation has been resolved pursuant to a Rule 12(b)(6) motion.[28] Envirocare then contends that the Fifth Circuit (in this case and previously) and a different panel of the Sixth Circuit have held that the objection is not waived or mooted where there has been a Rule 12(b)(6) adjudication.[29] These cases, however, do not even arguably present a circuit split on "the proper outcome [of a case] when the 'ensuing adjudication' to which *Caterpillar* refers is made pursuant to a motion to dismiss." Pet. 21-22.

Fatal to Envirocare's assertion is the simple fact that all four of these cases were decided prior to *Caterpillar*; they

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[28] *See* Pet. 22 (citing *Barbara v. New York Stock Exch.*, 99 F.3d 49 (2d Cir. 1996); *Vector Research v. Howard & Howard*, 76 F.3d 692 (6th Cir. 1996)).

[29] *See* Pet. 22 (citing *Chivas Products Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988); *Kidd v. Southwest Airlines*, 891 F.2d 540 (5th Cir. 1990)).

therefore could not possibly represent "a conflict in the Circuit Courts" as to the meaning of "the 'ensuing adjudication' to which *Caterpillar* refers." Pet. 22. At a minimum, this Court's limited resources should not be used to clarify its holding in *Caterpillar* before the circuit courts even have an opportunity to apply that decision.

In any event, the decision below is perfectly consistent with *Barbara* and *Vector Research* – the two decisions allegedly creating the split. Neither *Barbara* nor *Vector Research* even addressed the question whether resolution of the waiver issue should be affected by the stage to which the federal litigation had advanced. Even more important, unlike this case or *Caterpillar*, the plaintiff did not object to the removal in either of these cases. *See Barbara*, 99 F.3d at 55; *Vector Research*, 76 F.3d at 697. Thus, both were decided pursuant to this Court's decisions in *Grubbs* and *Finn*[30] – which, as *Caterpillar* directly held, are inapplicable to cases where the plaintiff *has* properly objected to the removal. *See Caterpillar*, 519 U.S. at 70-71.[31]

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[30] *See Barbara*, 99 F.3d at 55 (citing *Grubbs* and *Finn*); *Vector Research*, 76 F.3d at 697 (citing *Grubbs*).

[31] As petitioner's cursory treatment reflects, none of the six decisions cited in footnote 5 of the petition suggest any split. Half of them were decided prior to *Caterpillar* (*Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525 (8th Cir. 1996); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984); *Cades v. H&R Block*, 43 F.3d 869 (4th Cir. 1994)), and all of them are totally consistent with the decision below. *Koehnen* involved only the question whether the plaintiff could object to a notice of removal filed out of time; the court simply never addressed the difference between adjudication under Rule 12(b)(6) versus summary judgment. *See* 89 F.3d at 528-29. The other 5 cases involved *summary judgments* after removal, not the Rule 12(b)(6) resolution involved here. *See Akin v. Ashland Chem.*, 156 F.3d 1030, 1033 (10th Cir. 1998), *cert. denied*, 526 U.S. 1112 (1999); *Aqualon Co. v. MAC Equip., Inc.*, 149 F.3d 262, 264 (4th Cir. 1998); *Cades*, 43 F.3d at 872; *Herron v. Local Union 25*, No. 96-1335, 1998 U.S. App. LEXIS 1322, at *2 (6th Cir. Jan. 27, 1998) (unpublished); *Berstein*, 738 F.2d at 182. *Herron*,

In short, there is no circuit split on the question whether there is a *per se* rule that a plaintiff may successfully challenge removal on appeal after a judgment entered pursuant to Rule 12(b)(6), but not after summary judgment – an issue that in any event was not even addressed by the court below.

CONCLUSION

For the forgoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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moreover, was explicitly predicated on the court's finding that nothing in the record "suggest[ed] that [the plaintiffs] were substituting federal claims only as a result of the district court's denial of their motion to remand." *Herron*, 1998 U.S. App. LEXIS 1322, at *11. Thus, *Herron* recognized one of the central concerns of the court below in this case – plaintiff was deprived of *both* its claim and its forum by an erroneous removal ruling and thereby "coerced" into pleading a federal claim. *See* Pet. App. 3a, 11a n.5. And *Berstein*, decided pre-*Caterpillar*, relied on reasoning that *Caterpillar* expressly rejected. That is, *Berstein* reasoned that in order to avoid waiver, the plaintiff should have "stuck by his guns" – *i.e.*, foregone amending his complaint to add a federal claim – "and we would have vindicated his position on appeal." 738 F.2d at 185. In *Caterpillar*, however, this Court explicitly stated that "by timely moving for remand, [the plaintiff] did all that was required to preserve his objection to removal," and that "a plaintiff [is not] required to seek permission to take an interlocutory appeal . . . in order to avoid waiving whatever ultimate appeal right he may have." *Caterpillar*, 519 U.S. at 74.

FILE COPY

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 4, 2000

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 98-50952 Waste Control Spec v. Envirocare of Texas USDC No. MO-98-CV-62

Enclosed is an order which has been entered in the appeal referenced above.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Debbie Kranz
Debbie Kranz, Deputy
Clerk

Ms Sidney Katherine Powell
Mr Roy Q Minton

P.S. To Ms Powell: In light of the mandate having issued this day, under separate cover, your request to issue the mandate forthwith is considered moot.

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50952

WASTE CONTROL SPECIALISTS, LLC

Plaintiff – Appellant

v.

ENVIROCARE OF TEXAS INC; ET AL

Defendants

ENVIROCARE OF TEXAS INC; ENVIROCARE OF UTAH INC; KHOSROW B SEMNANI; CHARLES A JUDD; FRANK C THORLEY

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Texas, Midland

(Filed Apr. 4, 2000)

ORDER:

(x) The motion of Envirocare of Texas, Envirocare of Utah, Khosrow B Semnani, Charles A Judd and Frank C Thorley for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Envirocare of Texas, Envirocare of Utah, Khosrow B Semnani, Charles A Judd and Frank C Thorley for (X) stay ( ) recall and stay of the issuance of the mandate pending petition

for writ of certiorari is GRANTED to and including . The stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court advising that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk of this court within that time.

/s/ E. Grady Jolly
E. GRADY JOLLY
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLANDS-ODESSA DIVISION

WASTE CONTROL SPECIALISTS, LLC, *Plaintiff*	
v.	MO-98-CA-62
ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.; KHOSROW B. SEMNANI; CHARLES A. JUDD; FRANK C. THORLEY; BILLY W. CLAYTON; AND NANCY M. MOLLEDA, *Defendants*	

ORDER REMANDING CASE TO STATE COURT

(Filed June 19, 2000)

The above referenced case is an antitrust and business tort action by a waste disposal business against a competitor, alleging state antitrust and business tort claims based on disposal of waste generated by United States Department of Energy. The case was originally brought in the 109th District Court, Andrews County, Texas. Defendants removed the case to federal court on April 13, 1998. This Court denied Waste Control Specialists' motion to remand, and dismissed Plaintiff's complaint on ground that defendant's activities were protected under Noerr-Pennington doctrine. Plaintiff

appealed to the Fifth Circuit Court of Appeals, which held that this Court lacked subject matter jurisdiction over the case, concluding that this action was improperly removed to federal district court and that Waste Control Specialists' motion to remand should have been granted. The Fifth Circuit further directed this Court to award costs and fees to Waste Control Specialists upon submission of proper proof. Upon Defendants' petition for panel rehearing, the Fifth Circuit withdrew the portion of its opinion regarding attorneys' fees and directed the district court to decide "whether the removal of this case was or was not objectively reasonable, and, thus, whether to enter an appropriate award of attorney's fees as provided in [28 U.S.C.] § 1447(c)." (citing *Valdes v. Wal-mart Stores, Inc.*, 199 F.3d 290 (5th Cir. 2000). Now before the Court is Plaintiff's Withdrawal of Claim for Attorneys Fees, and Request for Summary Issuance of the Mandate Remanding the Case to State Court. Plaintiff disclaims its pending request for attorneys fees and costs and requests this Court to remand the case to the district court in Andrews County, Texas. Because Waste Control Specialists no longer urges its request for attorneys fees, the issue of whether it is entitled to attorneys fees is now moot and nothing prevents this Court from remanding the case to the state court from which it was removed, in accordance with the Fifth Circuit's mandate.

Accordingly,

IT IS ORDERED that this case be remanded to the 109th Judicial District Court of Andrews County, Texas, in accordance with 28 U.S.C. § 1447(c) and the Fifth Circuit's mandate.

IT IS FURTHER ORDERED that no costs and fees shall be awarded to Waste Control Specialists, as it has waived its entitlement to recovery.

SIGNED this 19 day of June, 2000.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON, III
SENIOR UNITED STATES
DISTRICT JUDGE

CAUSE NO. 14,580

WASTE CONTROL SPECIALISTS, LLC.	)(	
Plaintiff,	)(	IN THE DISTRICT COURT OF ANDREWS COUNTY, TEXAS 109th JUDICIAL DISTRICT
vs.	)(	
ENVIROCARE OF TEXAS, INC.,	)(	
ENVIROCARE OF UTAH, INC.,	)(	
KHOSROW B. SEMNANI,	)(	
CHARLES A. JUDD,	)(	
FRANK C. THORLEY,	)(	
Defendants	)(	

ORDER SETTING TRIAL

(Filed July 17, 2000)

Parties are advised that the above styled and numbered cause is set for trial beginning Monday, November 27, 2000 at 9:00 o'clock a.m.

SIGNED this the 14th day of July, 2000.

/s/ James L. Rex
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

WASTE CONTROL SPECIALISTS, LLC, Plaintiff,	§	
v.	§	
ENVIROCARE OF TEXAS, INC., ENVIROCARE OF UTAH, INC., KHOSROW B. SEMNANI, CHARLES A. JUDD, FRANK C. THORLEY, BILLY W. CLAYTON and NANCY M. MOLLEDA, Defendants.	§	CASE NO. M098CA062

DEFENDANTS' NOTICE OF REMOVAL

(Filed Apr. 13, 1998)

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendants Envirocare of Utah, Inc., Envirocare of Texas, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, Billy W. Clayton, and Nancy Molleda file this notice of removal to the United States District Court for the Western District of Texas, Midland Division. The grounds for removal are as follows:

1. The Defendants (except Billy Clayton and Nancy Molleda) are engaged in the business of disposing low-level radioactive waste. Envirocare of Utah owns and operates a disposal site in the State of Utah for low-level radioactive and mixed wastes. The Plaintiff is attempting

to enter into this market in Andrews, Texas. After failing to receive the requisite permits and other business, on May 2, 1997, Plaintiff sued the Defendants in the 109th Judicial District Court of Andrews County, Texas, Cause No. 14,580, alleging causes of action for violations of the Texas Free Enterprise and Antitrust Act of 1983, libel, slander, business disparagement, and tortious interference with prospective business relations.

2. On March 13, 1998, Plaintiff filed Plaintiff's First Amended Petition against the Defendants once again alleging causes of action for violations of the Texas Free Enterprise and Antitrust Act of 1983, libel, slander, business disparagement, and tortious interference with prospective business relations and seeking damages in excess of $3 billion. However, the alleged antitrust violations as stated in Plaintiff's First Amended Petition are fundamentally different than previously alleged and for the first time invoke the federal jurisdiction of the United States District Courts.

3. Specifically, Plaintiff's First Amended Petition states clearly for the first time that the Plaintiff's allegations of antitrust violations exclusively involve interstate commerce. Plaintiff's Original Petition alleged no geographic market and merely alleged monopolization of "the private sector market for the disposal of low-level radioactive wastes" and disposal of "mixed wastes." In contrast, Plaintiff's First Amended Petition alleges a monopoly in "the off-site private disposal market for DOE's mixed wastes" and in "the off-site private disposal market for DOE's low-level radioactive wastes." Plaintiff's First Amended Petition further alleges in Paragraph 27 that "the relevant market, for each of these products, is

the entire continental United States." Plaintiff alleges that Defendants Envirocare of Utah, Envirocare of Texas, and Semnani used their monopoly power to prevent the Plaintiff from receiving waste from the Department of Energy. Plaintiff specifically complains about not receiving a contract from the U.S. Army Corps of Engineers to dispose of certain quantities of DOE's low-level radioactive and mixed wastes and a disposal contract to receive waste from DOE's Fernald Ohio Facility. Clearly, although Plaintiff purports to allege antitrust violations under Texas law (and the Defendants recognize that the Texas statute is not preempted by the Sherman Act), Plaintiff is really alleging strictly federal antitrust violations since Texas law cannot regulate the stream of strictly interstate commerce as alleged in Plaintiff's First Amended Petition. Thus, if Plaintiff's antitrust allegations state a claim at all, they can only state a claim arising under federal law, the Sherman Act, 15 U.S.C. § 1 *et seq.*

4. This removal is filed pursuant to 28 U.S.C. § 1441(a), which provides for the removal of any civil action filed in a state court of which federal courts have original federal jurisdiction under 28 U.S.C. § 1331. Under 15 U.S.C. § 1 *et seq.*, federal courts have original jurisdiction over violations of the federal antitrust laws. The claims for libel, slander, business disparagement, and tortious interference with prospective business relations are also properly removable under the supplemental jurisdiction of the district courts of the United States in that they are so related to the federal antitrust claims that they form part of the same case or controversy.

5. Defendants received a copy of Plaintiff's First Amended Petition on March 13, 1998. This notice is thus

timely having been filed within thirty days of the receipt by the Defendants of the pleading made the basis of this removal, as required by 28 U.S.C. § 1446(b).

6. Plaintiff requested a jury trial in the state court proceeding.

7. All of the Defendants are represented by the undersigned counsel and consent to the removal of this action.

8. Defendants will promptly give Plaintiff written notice of the filing of this notice of removal as required by 28 U.S.C. § 1446(d). Defendants will also file a copy of this notice with the Clerk of the District Court of Andrews County, Texas, also pursuant to 28 U.S.C. § 1446(d).

9. Attached as Exhibit A is a copy of Plaintiff's First Amended Petition. With the filing of this Notice of Removal, Defendants have filed a copy of the state court pleadings with the Clerk of this Court.

Dated this 13th day of April, 1998.

Respectfully submitted,

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/s/ Roy Q. Minton
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ATTORNEYS FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been forwarded to the following by certified mail on the 13th day of April, 1998:

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/s/ Roy Q. Minton
Roy Q. Minton

CAUSE NO. 14,580

WASTE CONTROL SPECIALISTS, LLC, Plaintiff, v. ENVIROCARE OF TEXAS, INC., ENVIROCARE OF UTAH, INC., KHOSROW B. SEMNANI, CHARLES A. JUDD, FRANK C. THORLEY, GEORGE W. HELLSTROM, BILLY W. CLAYTON, and NANCY M. MOLLEDA, Defendants.	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF ANDREWS COUNTY, TEXAS 109TH JUDICIAL DISTRICT

DEFENDANTS' ORIGINAL ANSWER

(Filed Jun. 9, 1997)

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda (hereinafter collectively referred to as the "Defendants") file the following Original Answer to Plaintiff's Original Petition:

GENERAL DENIAL

I.

As authorized by Rule 92 of the Texas Rules of Civil Procedure, Defendants enter a general denial of the matters pleaded by the Plaintiff and request that the Court require Plaintiff to prove its charges and allegations as required by the law.

SPECIAL EXCEPTIONS

II.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants violated the Texas Free Enterprise and Antitrust Act of 1983 for the reason that the Plaintiff has failed to properly allege a monopoly violation against the Defendants. The disposal of low-level radioactive wastes and/or "mixed wastes" referred to in the Original Petition involve exclusively interstate commerce. Transactions which exclusively involve interstate commerce are not subject to Texas antitrust laws and instead are governed exclusively by the federal antitrust laws. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging an actionable violation of the Texas Free Enterprise and Antitrust Act of 1983 against the Defendants.

III.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants violated the Texas Free Enterprise and Antitrust Act of 1983 for the

reason that the Plaintiff has failed to properly allege a monopoly violation against the Defendants. Defendants stand in the relationship of principal and agent; therefore, as a matter of law Envirocare of Utah, Inc. and/or Envirocare of Texas, Inc. could not have conspired with Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, or Nancy M. Molleda in violation of the antitrust laws to create a monopoly violation as alleged by the Plaintiff. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging an actionable violation of the Texas Free Enterprise and Antitrust Act of 1983 against the Defendants.

IV.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants violated the Texas Free Enterprise and Antitrust Act of 1983. The Plaintiff fails to properly allege and identify the "relevant market" for antitrust purposes. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging the "relevant market" for purposes of a claim under the Texas Free Enterprise and Antitrust Act of 1983.

V.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Plaintiff is entitled to damages for violation of the Texas Free Enterprise and

Antitrust Act of 1993, libel and slander, business disparagement, and tortious interference with prospective business relations. Plaintiff's alleged damages are not capable of reasonable ascertainment, but instead are speculative and conjectural. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging damages for purposes of a claim under the Texas Free Enterprise and Antitrust Act of 1983 which are capable of reasonable ascertainment.

VI.

Defendants Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda specially except to Plaintiff's Original Petition in which it is alleged that they are individually liable for violating the Texas Free Enterprise and Antitrust Act of 1983, libel and slander, business disparagement, and/or tortious interference with prospective business relations. Defendants Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda deny that they are liable in the individual capacity in which they have been sued for the reason that the Defendants were at all material times acting as the agents of Envirocare of Utah, Inc. and/or Envirocare of Texas, Inc. and within the scope of proper authority. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging the manner in which each of the individual Defendants are liable in their individual capacities for each cause of action.

VII.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for libel and slander. Plaintiff fails to identify the defamatory statements each of the particular Defendants published. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging the defamatory statements each particular Defendant allegedly published to a third party.

VIII.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for tortious interference with prospective business relations. Plaintiff alleges that each of the Defendants "intentionally interfered with the Plaintiff's business relations with governmental agencies having authority to issue authorizations for the Plaintiff's entry into relevant markets for the storage, treatment, and/or disposal of low-level radioactive and mixed wastes, and/or to provide the Plaintiff with government contracts of substantial value to the Plaintiff." Plaintiff fails to identify and give the Defendants fair notice of the referenced prospective "business relations," "governmental agencies," "relevant markets," and "government contracts." Defendants request that the Court sustain this special exception and require the Plaintiff to replead identifying the prospective business relations, governmental agencies, relevant markets, and government contracts.

IX.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for tortious interference with prospective business relations. Plaintiff fails to allege and identify that with a "reasonable probability" the Plaintiff would have entered into a contract or business relationship with a governmental agency or other entity but for the Defendants' interference. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging facts sufficient to support a claim that with a "reasonable probability" the Plaintiff would have entered into a contract or business relation with a governmental agency or other entity but for the Defendants' interference.

X.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for tortious interference with prospective business relations. Plaintiff fails to properly allege a cause of action for tortious interference with prospective business relations against the Defendants because the Plaintiff does not adequately plead how the complained of actions violated the antitrust laws or caused the governmental agencies or other entities to refuse to deal with the Plaintiff. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging how the complained of conduct violated the antitrust laws or caused any third party to refuse to deal with the Plaintiff.

XI.

Defendants specially excepts to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for business disparagement for the reason that it fails to allege a cognizable cause of action under Texas law. Business disparagement is not a recognizable separate cause of action from libel which can afford independent relief to the Plaintiff.

XII.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Plaintiff "has realized pecuniary loss in the form of specific lost sales. . . . " However, the Plaintiff never identifies the "specific lost sales" which is necessary to allow the Defendants the opportunity to raise appropriate defenses. Defendants request that the Court sustain this special exception and require the Plaintiff to replead identifying with at least a reasonable degree of particularity the "specific lost sales."

AFFIRMATIVE DEFENSES

XIII.

By way of further answer, if any is necessary, Defendants allege that the alleged defamatory statements at issue are true and/or substantially true.

XIV.

By way of further answer, if any is necessary, Defendants allege that the alleged defamatory statements at issue contain statements of opinion and other statements that are not actionable assertions of fact about the Plaintiff.

XV.

By way of further answer, if any is necessary, Defendants allege that they are entitled to immunity from any liability under the Texas Free Enterprise and Antitrust Act of 1983 as it relates to the allegations that the Defendants improperly lobbied and contacted governmental officials. Defendants specifically deny that they ever did anything to improperly influence government officials. Nonetheless, efforts to influence public officials do not violate the antitrust laws even if the intended result is the elimination of competition. Stated differently, persons who engage in a publicity campaign directed toward influencing governmental action is immune, even if dishonest means were used in the publicity campaign and even if a side effect of the campaign was to injure the competitor's campaign.

XVI.

By way of further answer, if any is necessary, Defendants allege that if the Defendants have obtained monopoly power, it was not willfully acquired or maintained. Instead, it resulted from growth of development as a

consequence of a superior product, business acumen, or historical accident.

XVII.

By way of further answer, if any is necessary, Defendants Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda allege that they are not liable in their individual capacities.

XVIII.

By way of further answer, if any is necessary, Defendants allege that they are privileged from liability for any of the complained of conduct. The Defendants only engaged in reasonable competition within the realm of fair play.

COUNTERCLAIMS

XIX.

Defendants allege that Plaintiff's action is groundless and brought in bad faith or for the purpose of harassment. Defendants therefore request that they be awarded their costs, reasonable attorney's fees, and other litigation expenses from the Plaintiff.

WHEREFORE, Defendants Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda request that the Court sustain their special exceptions and ultimately obtain a

judgment of the Court that the Plaintiff, Waste Control Specialists, LLC, take nothing by this suit and that the Defendants recover their costs, reasonable attorney's fees, and other litigation expenses.

Respectfully submitted,

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COUNSEL FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following on this 9th day of June, 1997:

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/s/ Roy Q. Minton
ROY Q. MINTON

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Frank C. Thorley, a duly authorized representative of Environcare of Utah, Inc. and Envirocare of Texas, Inc., who, after being duly sworn, stated that he has read the above pleading and that the statements contained in Paragraphs III, XIV, XV and XVIII

of the pleading are within his personal knowledge and are true and correct.

/s/ F. C. Thorley
Frank C. Thorley

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
the State of Utah
My commission expires
Sept. 13, 1999

[SEAL]
Notary Public
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4181 West Kirkcaldy Circle
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My Commission Expires
September 13, 1999
State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Khosrow B. Semnani, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ Khosrow B. Semnani
Khosrow B. Semnani

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
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Sept. 13, 1999

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My Commission Expires
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State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Charles A. Judd, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ Charles A. Judd
Charles A. Judd

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
the State of Utah
My commission expires
Sept. 13, 1999

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4181 West Kirkcaldy Circle
South Jordan, Utah 84095
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September 13, 1999
State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Frank C. Thorley, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ F. C. Thorley
Frank C. Thorley

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
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My commission expires
Sept. 13, 1999

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VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared George W. Hellstrom, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ George W. Hellstrom
George W. Hellstrom

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
the State of Utah
My commission expires
Sept. 13, 1999

[SEAL]
Notary Public
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September 13, 1999
State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Billy W. Clayton, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ Billy W. Clayton
Billy W. Clayton

SUBSCRIBED AND SWORN TO BEFORE ME on the 4th day of June, 1997.

/s/ Myra Sutherland
Notary Public in and for
the State of Texas
My commission expires
3-30-01

[SEAL]
MYRA SUTHERLAND
Notary Public, State of Texas
My Commission Expires
MARCH 30, 2001

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Nancy M. Molleda, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ Nancy M. Molleda
Nancy M. Molleda

SUBSCRIBED AND SWORN TO BEFORE ME on the 4th day of June, 1997.

/s/ Bennie Anderson
Notary Public in and for
the State of Texas
My commission expires
5-4-2001

[SEAL]
BENNIE ANDERSON
Notary Public, State of Texas
My Commission Expires
MAY 4, 2001

NO. 98-50952

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WASTE CONTROL SPECIALISTS, L.L.C.,
Plaintiff-Appellant

v.

ENVIROCARE OF TEXAS, INC., ENVIROCARE OF UTAH, INC., KHOSROW B. SEMNANI, CHARLES A. JUDD, AND FRANK C. THORLEY,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION
MO-98-CV-62

BRIEF FOR APPELLEES

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* * *

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* * *

In this case, WCS cured any alleged federal jurisdictional defect by voluntarily amending its Complaint to expressly allege a federal cause of action and by doing so confirmed its consent to adjudicate its suit in federal court. Following such amendment, this case proceeded to judgment and fairness to both parties was uncompromised throughout the process. The District Court clearly obtained jurisdiction before the entry of final judgment, and case law confirms that since federal jurisdiction existed, remand is improper.

II. THE DISTRICT COURT'S DENIAL OF WCS' MOTION TO REMAND WAS CORRECT.

Even if WCS may challenge the District Court's decision on the remand issue, that challenge should be rejected.

A. The First Amended Petition's Antitrust Allegations Could Only Be Addressed Through Application of the Sherman Act.

Where a state claim and a federal claim are available to plaintiff, it may avoid removal by bringing only the former in a state court. Plaintiff may not, however, avoid removal by pleading in state law terms a claim that is, in fact, solely federal in nature. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995).

The Texas Free Enterprise and Antitrust Act, TEX BUS. & COM. CODE §§ 15.01 *et seq.*, ("Texas Act") does not apply to WCS' antitrust claims. Because WCS' allegations could be addressed only through application of the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, no viable state claim was available and removal was proper. *See Carpenter*, 44 F.3d at 366 (case removable where plaintiff "has available no legitimate or viable state cause of action").[3]

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[3] Numerous cases have upheld removal on this ground in the antitrust context. *See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, CA 3-95-CV-1010-G (N.D. Tex. 1996) (attached at Tab B), *aff'd*, 145 F.3d 320 (5th Cir. 1998), *cert. denied*, 1999 WL 8053 (U.S. Jan. 11, 1999); *In re NASDAQ Mkt. Makers Antitrust Litig.*, 929 F. Supp. 174 (S.D.N.Y. 1996); *Mechanical Rubber & Supply Co. v. American Saw & Manuf. Co.*, 747 F. Supp. 1292, *vacated in part*

1. The First Amended Petition Does Not Allege Harm To Any Texas Consumer.

Antitrust law protects consumers, not individual competitors. *Roy B. Taylor Sales v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994); *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex. App. – Fort Worth 1994, writ denied). The Texas Act makes this clear:

> The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state.

TEX. BUS. & COM. CODE § 15.04. *See Caller-Times Publishing Co. v. Triad Communications, Inc.*, 826 S.W.2d 576, 581 (Tex. 1992) (Texas Act seeks to "benefit the consumers of the state," not individual competitors).

WCS' First Amended Petition alleged (1) that the product (more accurately, service) market at issue was

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on other grounds, 810 F. Supp. 986 (C.D. Ill. 1990); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 1987-1 Trade Cases (CCH) ¶ 67,453 (D. Mass. 1986), *vacated and remanded on other grounds*, 834 F.2d 208 (1st Cir. 1987); *Buchanan v. Delaware Valley News*, 571 F. Supp. 868 (E.D. Pa. 1983); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566 (N.D. Cal. 1981), *modified*, 731 F.2d 1423 (9th Cir. 1984); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. (1980); *Three J Farms, Inc. v. Alton Box Bd. Co.*, 1979-1 Trade Cases (CCH) ¶ 62,423 (D.S.C. 1978); *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (N.D.N.Y. 1964). Such cases rebut WCS' suggestion, discussed *infra*, that removal in this context cannot occur because such removal would be improperly based on a "federal defense" of "preemption" or because the alleged conduct affected a business located in the state at issue.

limited to private disposal of DOE's radioactive waste and (2) that the sole purchaser of that service was DOE. *See, e.g.*, FAP ¶¶ 12, 27, 91-107 (R. 277, 281, 307-10).

Thus the only consumer whose interest is affected by the state of competition in the relevant market is the United States government. In such circumstances the Texas Act does not apply. *See Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 2d 433, 464 (S.D. Tex. 1997) (Texas Act does not apply simply because conduct at issue "has some effect on a Texas entity"; Act inapplicable where defendant did nothing "affecting the ability of Texas consumers to obtain the benefits of competition"); IP. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 216 at 295 (rev. ed. 1997) (hereinafter "AREEDA ¶ ___") (state statute applies where case involves "sufficient injury to [the state's] consumers").

WCS tries to skirt the issue by suggesting that its pleading implicates the interest of Texas citizens or taxpayers generally. Brief 32-33. This ignores the point of antitrust law, which is to benefit those who purchase the product in the relevant market by promoting competition therein. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Caller-Times*, 826 S.W.2d at 582 (central goal of Texas act is "[l]ow prices for consumers"). This is undoubtedly why the Legislature, having used the broad term "person" throughout the Act, chose instead the precise term "consumer" in § 15.04.

If any impact on a "citizen" of a state were sufficient to invoke that state's antitrust law, then federal question removal in antitrust cases would never be appropriate since the realities of modern commerce dictate that one

could always divine **some** impact attenuated or otherwise, upon one or more taxpayers or businesses in a given state. The courts reject such an overly-broad interpretation.[4]

2. The First Amended Petition Involves Issues of Interstate Commerce Only.

WCS' First Amended Petition claims that Envirocare prevented WCS from entering into contracts with a federal agency, which harmed competition in the national market for disposal of federal waste, where the only consumer is the United States. Having made such allegations, WCS cannot support its argument that this case somehow presents issues of intrastate commerce that invoke the Texas Act.

Perhaps to muddy the water, WCS discusses preemption, but this is not a preemption case and the issue is a red herring.[5] Envirocare also does not dispute the strawman argument that the Texas Act does not lose its force simply because a case involves a restraint touching on both interstate and intrastate commerce.[6] Where the only

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[4] *See* cases cited at notes 3, 7.

[5] Under some circumstances a plaintiff could choose either a Texas antitrust claim or a Sherman Act claim. *See* AREEDA ¶ 216. The Texas Act is a valid law; it just does not apply because, under the facts here alleged, the essence of **WCS' own claim**, not any defense, is necessarily federal in nature. WCS' argument that a defense cannot provide the basis for removal is irrelevant. Brief 17-24.

[6] *Elray, Inc. v. Cathodic Protection Serv.*, 507 S.W.2d 570 (Tex.Civ.App. – Houston [14th Dist.] 1974, no writ) stands for

commerce at issue is interstate, however, the Texas Act has no application. *Pounds Photographic Labs, Inc. v. Noritsu America Corp.*, 818 F.2d 1219, 1224 (5th Cir. 1987); *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97, 107 (5th Cir. 1967).

WCS' suggestion that the Texas Act applies merely because WCS alleges harm to its business in Texas evinces a basic misunderstanding of the purpose of antitrust law. As noted above, antitrust law is **not** aimed at protecting individual competitors. *Roy B. Taylor Sales*, 28 F.3d at 1382 Rather, antitrust statutes are concerned with the state of competition in the relevant market and the consumers who make purchases therein. *Doctor's Hosp. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997). Where the very nature of the commerce at issue, not to mention the sole purchaser, is federal or interstate in nature, then the mere fact that an affected competitor happens to be located in a given state is insufficient to invoke that state's antitrust law. This principle is established by the cases cited herein. *See* notes 3, 7. More fundamentally, it is a principle that flows naturally from the difference between antitrust (which protects competition) and other laws, such as torts (which protect the businessman).

---

this unremarkable proposition. There, Texas law applied to an agreement executed in Texas between two Texas entities involving anticompetitive contractual restrictions on Texas manufacturing and Texas sales. The Court's decision that Texas law applied even though both in-state and out-of-state sales were involved is not surprising, but it sheds no light on the rule applicable here.

Simply put, WCS never answers the real question: Why should the State of Texas care about the price paid by the United States Government for disposal of DOE waste?

WCS asserts that Texas law applies "if any component of a transaction affects intrastate commerce," (Brief 29) but what does that mean? The cases make clear that it does **not** mean that any impact felt, or activity occurring, within Texas is sufficient to invoke the Texas Act.[7] Even assuming that the "transaction" analysis fits the instant case, where is the "component" that can be isolated as adversely affecting intrastate commerce in a pleading concerning **federal** waste disposal pursuant to **federal** contracts and a **federal** procurement process, where the only purchaser is a **federal** agency, where the whole point of the case is alleged interference with **federal** authorization to do business, and where the "sole and exclusive" legal authority over the entire matter is proclaimed by WCS itself (R. 933-34) to reside in the **federal** government?

---

[7] *See Cherokee*, 383 F.2d 97 (federal, not Texas, antitrust law applied even though conduct occurred in Texas and harmed Texas business); *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 413 (5th Cir. 1962) (federal antitrust law applied even though party claiming violation was Texas business engaged in manufacturing and sales in Texas); *Hughes Bros. Mfg. Co. v. Cicero Trust & Sav. Bank*, 24 F.2d 199 (5th Cir. 1928) (transaction interstate in nature despite harm to Texas business); *Destec*, 5 F. Supp. 2d at 464; *Albertype Co. v. Gust Feist Co.*, 114 S.W. 791 (Tex. 1908); *Sloan v. Miami Margarine Co.*, 247 S.W.2d 159 (Tex. Civ. App. – Dallas 1952, writ ref'd n.r.e.); *Green v. Temple-Stuart Co.*, 408 S.W.2d 744, 746 (Tex. Civ. App. – Fort Worth 1966, no writ).

Not so fast, says WCS: what about the DOE "Pantex" site in Amarillo? WCS argues that the District Court "[w]rongly and inappropriately resolv[ed] key factual disputes" in rejecting WCS' argument in this regard. Brief 18 n.18.

Unfortunately for WCS, no fact dispute **had** to be resolved in this issue: as noted above, its own pleading framed the issues in the case. Texas' manifest lack of interest in the economics of DOE waste disposal would not be altered simply because a shipment of such waste happened not to cross state lines. *See E.F.I., Inc. v. Marketers Int'l, Inc.*, 492 S.W.2d 302, 304 (Tex. Civ. App. – Houston [1st Dist.] 1973, writ ref'd n.r.e.) (federal antitrust law governs if intrastate nature of party's business is "merely incidental to the interstate nature of it").

WCS' charge against the District Court is ironic in any event, since removal was based on the face of the First Amended Petition, which contains not a word about Amarillo or Pantex or shipments from there to WCS. WCS' "cite" on this point is not to its pleading, but rather to a page in a WCS Motion filed below. Brief 5 n.8 (*citing* R. 636 [page 6 of its Motion to Remand, in turn citing testimony wherein the word "Pantex" is mentioned]). That WCS would (1) attempt to support a "fact" (itself of questionable import since unpled[8]) with a reference to its own Motion, (2) then "support" its assertion regarding

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[8] The focus is on the face of the pleading, not *post hoc* attempts by plaintiff to add some local color to its allegations. 16 J. MOORE, MOORE'S FEDERAL PRACTICE § 107.41[1][e][ii] at 107-99 (3d ed. 1998) (on remand motion, inquiry focuses on complaint "as it is stated at the time of removal").

Pantex with sheer speculation (*i.e.*, failure to point to a shred of admissible evidence that there even is any radioactive waste at Pantex, or that DOE needs to dispose of it off-site, or that DOE would have any desire to ship it to WCS in any event), and (3) then take the District Court to task for "inappropriately" resolving "key factual disputes" when it was WCS who failed to plead those supposedly-crucial "facts" in the first place, is suggestive of the length to which WCS has strayed from cogent argument.

WCS points to *Pounds*, but the decision is distinguishable since a discrete "component" of the commerce there concerned conduct that implicated the interests of Austin consumers of photo finishing services, who would have benefitted from increased competition and choice in the local marketplace. Indeed, the Court stressed that the conduct at issue "restrict[ed] trade or lessen[ed] competition in the Austin photo lab business," and thus was a matter within the purview and interest of Texas law. *Pounds*, 818 F.2d at 1224.

Segal v. McCall Co., 184 S.W. 188 (Tex 1916), is similar: the Court there was surely correct to find that Texas had an interest where the contract at issue – described as one that "fixes the price at which the vendee shall sell at retail in Texas" – would have restricted the ability of Texas consumers to enjoy the fruits of open competition in the purchase of sewing goods. As with *Pounds*, the contrast between that fact pattern and the one described in the First Amended Petition is apparent.

WCS argues from *Segal* (Brief 30-31) that the Court should focus on where DOE waste would be disposed of,

not where it would be transported from (a quick reversal from its earlier emphasis on the importance of the hypothetical Amarillo-to-WCS shipments). Actually, the focus should be on neither: as noted above, the question here is not one of geography but rather of competitive effect, *i.e.*, whether the price of DOE waste disposal is of interest to Texas law. Geographical references can be a **means** of establishing local competitive impact, which is the real issue; here, however, WCS' attempt to add local flavor to this case is unavailing in light of a pleading that establishes only a federal economic interest in the health of competition in the relevant market.

B. Removal Was Proper Despite the Lack of Preemption.

WCS suggests that removal was inappropriate because removal on "artful pleading" grounds is proper only in cases involving complete federal preemption of state law. Brief 14, 18-24. WCS did not make this argument below and thus waived it. *Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr.*, 19 F.3d 241, 243 n.4 (5th Cir. 1994).

The argument is wrong in any event. A federal question is a federal question; it is no less so simply because its federal nature results from something other than preemption. *Carpenter* makes this point: "If the only remedy available to plaintiff is federal, because of preemption **or otherwise**, and the state court necessarily must look to

federal law in passing on the claim, the case is removable. . . . "[9]

Accordingly, this Court has not limited removal to "complete preemption" cases,[10] and the rule advocated by WCS has been criticized. *See* 14B C. WRIGHT, § 3722 at 444-45 (such a rule "hardly can be considered very well established").

This Court wrote in *Carpenter* that "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Carpenter*, 44 F.3d at 366. That passage describes this case: WCS cannot support a state claim and thus it must rely on federal law as surely as a plaintiff must in the preemption context. Federal courts have exclusive jurisdiction over cases arising under the Sherman Act.[11] Removal was therefore appropriate.

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[9] 44 F.3d at 366 (*quoting* 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722 (2d ed. 1985)) (emphasis added).

[10] *See, e.g., De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995); *Nunn v. Feltinton*, 294 F.2d 450, 453 (5th Cir. 1961); *Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengelsellschaft*, 855 F.2d 215 (5th Cir. 1988); *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976).

[11] *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir. 1976).

C. Removal Was Timely.

It is undisputed that Envirocare filed its notice of removal within 30 days of receipt of the First Amended Petition. The federal nature of WCS' antitrust claims was first revealed in that pleading, and removal was therefore timely.

Comparing WCS' Original Petition with its First Amended Petition reveals significant differences concerning the consumer whose interests were allegedly at stake and the relevant markets allegedly at issue. In sum: the market alleged in the Original Petition included commercial and federal waste; however, the First Amended Petition limited the relevant market to federal (DOE) waste.

The Original Petition recognized the difference between DOE waste and waste from other sources such as commercial companies, *E.g.*, OP¶¶ 21-22 (R. 355-56); ¶ 39 (R. 362). Having done so – and having demonstrated its ability to distinguish between the two – WCS then stated its antitrust causes of action. Absent was any distinction between DOE and non-DOE waste. Also absent was any limitation of WCS' claims to the market for disposal of DOE waste only. *See* OP¶¶ 87-92 (R. 380-81).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

WASTE CONTROL SPECIALISTS, LLC	§	
v.	§	CIVIL ACTION NO.
	§	MO-98-CA062
ENVIROCARE OF TEXAS, INC., et al.	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO REMAND

(Filed May 01, 1998)

TO THE HONORABLE LUCIUS D. BUNTON:

Defendants Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, Billy W. Clayton, and Nancy M. Molleda file this response opposing the motion to remand filed by Plaintiff Waste Control Specialists, LLC ("WCS").

INTRODUCTION

This case arises out of WCS' desire to import radioactive waste from United States Department of Energy ("DOE") sites all over the country to its proposed disposal facility in Andrews County, Texas, without first obtaining any permits or licenses from the U.S. Nuclear Regulatory Commission ("NRC") or the State of Texas, and without being subject to their extensive regulatory oversight designed to protect the public safety and the environment.

Envirocare operates a low-level nuclear disposal site in Utah, which is licensed and permitted by the NRC and State of Utah, and is, accordingly, subject to extensive safety and environmental regulations. In various contexts, Envirocare has participated in governmental proceedings related to WCS' unorthodox proposal. After involved agencies, including DOE, rejected WCS' scheme, WCS sued Defendants in Texas state court for purported violations of Texas antitrust law, defamation and tortious interference. WCS also sued DOE in a separate federal court proceeding for refusing to consider its bid to dispose of nuclear waste from a DOE facility in Ohio.

On March 13, 1998, WCS filed its First Amended Petition in which, for the first time, WCS clarified two important points about its claims: (1) WCS' antitrust claims are based entirely on Envirocare's alleged monopolization of the market for the disposal of federal (DOE) nuclear waste and (2) the relevant market for WCS' antitrust claims is "the entire continental United States." *First Amended Petition* ¶¶ 23, 25, 27 28-32. These clarifications revealed that the facts and allegations underlying WCS' antitrust claims are completely outside the scope of any Texas law – despite WCS' artful pleading of its claim as one under Texas' antitrust statute – and that if such facts and allegations make out any antitrust claim at all, it must be federal in nature.[1] Accordingly, Envirocare removed this action pursuant to 28 U.S.C. §§ 1441(a) and 1446(b).

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[1] As set out in Defendants' Motion to Dismiss filed with this Court on April 20, 1998, WCS has also failed to state a claim under Federal law upon which relief can be granted.

SUMMARY OF ARGUMENT

WCS makes three main arguments for remand. First, it claims that the removal was premised on federal preemption and, since federal antitrust law does not preempt state antitrust law, removal was improper. Contrary to WCS' mischaracterizations, the removal was based on the artful pleading doctrine under which removal is proper, in the words of Professors Wright and Miller when "the only remedy available to plaintiff is federal, because of preemption or otherwise." Here the only antitrust remedy available to WCS is federal, not because of federal preemption but because, under long-established *Texas* law, the Texas antitrust statute does not reach to exclusively interstate transactions – like those pled in WCS' First Amended Petition. Moreover, Texas antitrust law could not reach WCS' amended claims for an even more fundamental reason – they exclusively involve the market for disposal of DOE's low-level nuclear waste, an area that WCS itself insists is "solely and exclusively" governed by federal law.

Second, WCS contends that because WCS is a Texas corporation, its proposed disposal facility is located in Texas and one DOE facility is in Texas, its claims have an intrastate component sufficient to state a claim under the Texas antitrust statute. Under Texas law, however, the plaintiff's venue cannot support a Texas antitrust claim if the transactions at issue are interstate. Everything has to occur somewhere; interstate commerce does not become intrastate commerce simply because a component activity does not straddle state lines. Moreover, the fact that one DOE facility from which WCS hopes to obtain a disposal contract is located within Texas does not change the

conclusion that contracts with the federal government, whether "intrastate" or otherwise, cannot be reached by the Texas antitrust laws.

Finally, WCS claims that Envirocare has waived removal. But, it was only when WCS affirmatively eschewed any claims relating to any intrastate market in the First Amended Petition, by defining the market at issue as wholly interstate and wholly federal in character, that any possible Texas antitrust claim on the face of WCS' pleading was foreclosed. At that time, the case was plainly a case involving purely federal law and federal issues, removable under applicable authorities related to federal question jurisdiction.

WCS CANNOT AVOID FEDERAL JURISDICTION BY ARTFULLY PLEADING AN INVALID STATE ANTITRUST CLAIM

WCS argues that under the "well-pleaded" complaint" rule "[i]t is well-settled that where a plaintiff could maintain claims under *both* federal and state law, such plaintiff may choose to ignore the federal claim and allege *only* state law claims and remain in state court." *Motion to Remand* at 3 (emphasis in original). Precisely. When a plaintiff has valid federal *and* state causes of action, it can choose to assert only the state cause of action, thus barring removal on federal question grounds. *Carpenter v. Wichita Falls I.S.D.*, 44 F.3d 362, 366 (5th Cir. 1995). *But*, as in this case "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Id.; see also Avitts v. Amoco Prod. Co.*, 53

F.3d 690, 693 (5th Cir. 1995) ("Of course, [the well-pleaded complaint rule] does not mean that a plaintiff can avoid federal jurisdiction by simply 'artfully pleading' a federal cause of action in state law terms."). This case falls squarely into the "artful pleading" exception.

As WCS makes clear for the first time in its First Amended Petition, WCS' purported Texas antitrust cause of action is based entirely on interstate, federal transactions. It is well established, however, that the Texas antitrust statute does not reach interstate transactions. *Segall v. McCall Co.*, 184 S.W. 188, 189 (Tex. 1916) ("The State Antitrust Act was not intended to encroach upon a field of legislation [interstate commerce] over which it had no jurisdiction."); *Pounds Photographic Labs v. Noritsu America Corp.*, 818 F.2d 1219, 1224 (5th Cir. 1987) ("The Texas courts have held that the Texas antitrust statutes do not apply to agreements that relate wholly to interstate commerce."); *Cherokee Lab., Inc. v. Rotary Drilling Servs., Inc.*, 383 F.2d 97, 107 (5th Cir. 1967) ("Any restraint on the marketing of the product was imposed in interstate commerce and not after the product had been put into intrastate commerce. The legality *vel non* of the dealings should be tested by the federal antitrust laws and not by those of the State of Texas"), *cert. denied*, 390 US 904 (1968); *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 413 (5th Cir. 1962) ("the contract in question was interstate as to execution and performance. The contract should be tested by the Federal antitrust laws. The antitrust laws of the State of Texas do not apply.").

Numerous courts have applied the artful pleading exception and denied remand under exactly the same circumstances presented here – where a plaintiff attempts

to invoke a state law antitrust cause of action for entirely interstate transactions. *In re Nasdaq Market Matters Antitrust Litig.*, 929 F. Supp. 174, 178-79 (S.D.N.Y. 1996); *Mechanical Rubber & Supply v. American Saw & Mfg.*, 747 F. Supp. 1292, 1295 (C.D.Ill. 1990); *Buchanan v. Delaware Valley News*, 571 F. Supp. 868, 872 (E.D.Penn. 1983); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79, 82-83 (E.D.N.Y. 1980). In *Mechanical Rubber & Supply* the court explained its holding as follows:

> Where, as here all defendants are unquestionably engaged in interstate commerce, those who are damaged from an alleged restraint of trade find a remedy in the federal, not the state, antitrust laws. This conclusion is buttressed in this case by the longstanding holding of the [relevant state's] Supreme Court . . . that the state antitrust statute under which the plaintiffs have attempted to bring their action applied only to intrastate commerce and does not reach interstate commerce of any kind.

747 F. Supp. at 1295, *quoting In re Wiring Device*, at 82. Exactly the same is true in this case.

There is another reason why WCS has not alleged a claim that can be reached by Texas antitrust law. In its First Amended Petition, WCS made it clear that its antitrust claims *exclusively* involve the market for the disposal of low-level nuclear waste from DOE sites. *First Amended Petition* ¶ 27. Lawyers for WCS confirmed this fact at a hearing before Judge Cowan on April 3, 1998, stating flatly that "[t]his case is about DOE." *Transcript* at

202.[2] WCS' remand motion reiterates that its antitrust claims are based solely on the DOE market: "Here Plaintiff's alleged product market involves low-level radioactive and mixed wastes to be shipped to Texas from DOE sites around the country (including a site in Texas) for disposal in Texas." *Motion to Remand* at 7.

In its federal lawsuit against DOE, WCS acknowledged that "sole and exclusive" authority over the disposal of DOE's low-level nuclear waste rests with the *federal* government, under federal statutes. *See Waste Control Specialists, LLC v. United States Dep't of Energy*, Fifth Circuit Appeal No. 97-11353, Appellee's Brief at 6-8 (attached hereto at Appendix Tab 2). Because, in WCS' words, the federal government has "sole and exclusive" authority over the very contracts that form the basis for WCS' antitrust claim, Texas antitrust law cannot reach these claims for the same reason it cannot reach interstate transactions – because to do so would encroach on Congress' exclusive domain. *See Segall v. McCall Co.*, 184 S.W. at 189 (Texas antitrust statute does not apply to transactions exclusively controlled by federal law).[3]

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[2] Relevant portions of this transcript are attached at Appendix Tab 1.

[3] Indeed, by its very terms the Texas Act does not apply to cases where, as here, the restraint at issue is the result of valid state or federal action. TEX.BUS.&COM.CODE §15.05(g).

WCS' ATTEMPTS TO EVADE THE ARTFUL PLEADING RULE ARE UNAVAILING

Federal Preemption is Irrelevant: The central thesis in WCS' motion to remand is its incorrect assertion that Defendants' removal is premised on federal preemption. The removal was not based on federal preemption, but on the artful pleading rule which allows removal in *any* instance in which a plaintiff attempts to plead a cause of action based on facts that make out a valid federal claim but do not – because of federal preemption or otherwise – support any state law claim. This point was expressly made by the Fifth Circuit in *Carpenter*:

> [I]n many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not. If the only remedy available to plaintiff is federal, *because of preemption or otherwise*, and the state court must necessarily look to federal law in passing on the claim, the case is removable regardless of what is in the pleading.

44 F.3d at 366, *quoting* 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, pp. 270-75 (2d ed. 1985) (emphasis added).

In *Mechanical Rubber & Supply*, the court expressly rejected the argument WCS makes here:

> [Defendant] concedes it is clear after *California v. ARC America Corp.*, 490 U.S. 93 . . . (1989), that federal antitrust law is not intended in any direct way to preempt state antitrust law except where there might be a direct conflict between

> the two laws. However, it maintains that its position is not that federal antitrust laws preempt the state antitrust laws, but that the federal antitrust laws apply to acts affecting or occurring in the flow of commerce and that the Illinois antitrust laws apply to acts affecting intrastate commerce.
>
> This Court agrees with the Defendant. Count I is sufficiently federal in character that the Court has subject matter jurisdiction over [Defendant] and the Plaintiff must properly bring this count under the federal antitrust laws.

747 F. Supp. at 1296; *see also Cassel v. Webco Indus., Inc.*, 942 F. Supp. 1409, 1411 (N.D. Okla. 1996) (denying remand based on finding that, while plaintiff's wrongful termination cause of action under state law made out a Title VII claim, it raised no valid claim under state law).

Neither of the two cases cited by WCS held that federal preemption is required for removal. In *Thompson v. Nashua Corp.*, 907 F. Supp. 247 (W.D.Tex 1995), the court expressly found that the plaintiff, whose allegations were based on the San Antonio/South Texas market, had made out a claim under the Texas antitrust laws. *Id.* at 249. Because the plaintiff had made out a valid violation of the Texas antitrust act, the artful pleading rule did not apply. *Id.* In *Mayfield v. Hartford Life Ins. Co.*, 699 F. Supp. 605 (W.D. Tex. 1988), the court remanded an antitrust action filed in state court by the Texas Attorney General alleging antitrust violations in the pricing and marketing of insurance in Texas. The court held that *neither* the artful pleading rule nor the complete preemption doctrine applied to create a basis for removal jurisdiction. *Id.* at 604-05.

Both *Thompson* and *Mayfield* evaluated removal under the artful pleading rule independent of federal preemption; neither suggests that such rule requires federal preemption. Both cases involved state antitrust claims based on a non-federal, *intrastate* market. Because WCS has failed to state an antitrust claim cognizable under Texas law but did plead claims governed by federal law, the artful pleading rule applies under the same analysis employed in *Thompson* and *Mayfield*.

WCS' Claims Do Not Contain An Intrastate Component That Can Be Reached By Texas Antitrust Law: WCS asserts that its claims based on the alleged monopolization of the market for DOE and nuclear waste have an intrastate component sufficient to sustain a cause of action under Texas antitrust law because WCS is a Texas corporation and its disposal facility is located in Texas.[4] *Motion to Remand* at 5-6. WCS also claims that because DOE has a facility in Texas that generates nuclear waste, part of the relevant market is intrastate. *Id.* at 6. WCS is wrong.

First, WCS concedes that the market for disposal of DOE's low-level nuclear waste is under exclusive federal control; thus the DOE transactions on which WCS' antitrust claims are based cannot be subject to the Texas

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[4] Inconsistent with its reliance on the well-pleaded complaint rule, WCS attempts to shore up its position on remand by reference to facts not included in its pleading about the Pantex facilities near Amarillo. The reference to facts outside the pleading can only be viewed as tacit admission by WCS that the Amended Petition is removable on its face.

antitrust statute.[5] Moreover, since WCS now identifies DOE as the only consumer in its market, WCS cannot point to a single Texas consumer whose welfare is at issue.[6] With neither a local market nor any harm to a Texas consumer, WCS' claims are clearly outside the scope of the Texas antitrust statute.[7] Accordingly, WCS' contention that one DOE facility that might someday be subject to a WCS proposal is in Texas is irrelevant.

Second, antitrust allegations about alleged harm to Texas commerce are insufficient to make out a claim under Texas law if the claims involve only the *interstate* movements of goods. In *Green v. Temple-Stuart Co.*, 408 S.W.2d 744, 746 (Tex. Civ. App. – Fort Worth 1966, no writ), the plaintiff, a Texas retailer, sued a Massachusetts furniture manufacturer under the Texas antitrust statute, claiming to have suffered damages as a result of the defendants' agreement with a competing Texas retailer to sell furniture to that retailer only. Even though the plaintiff alleged an antitrust violation affecting intrastate commerce, the court ruled that the Texas statute did not apply

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[5] TEX.BUS.&COM.CODE §15.05(*g*). In fact, Texas law bars private disposal of the radioactive waste at issue in this case. TEX. HEALTH & SAFETY CODE §401.203. WCS has acknowledged that it could only engage in such activity as a DOE contractor within the "sole and exclusive" jurisdiction of federal law.

[6] Consumer welfare is the focus of any antitrust case. *Doctor's Hospital v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997); *Consolidated Metal Prod., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 292-293 (5th Cir. 1988).

[7] The purpose of the Texas antitrust statute is " . . . to provide the benefits of . . . competition to *consumers in the state*" TEX.BUS.&COM.CODE §15.04. (emphasis added.)

because the agreement at issue was interstate. *Id.* at 746. Likewise, in *Sloan v. Miami Margarine Co.*, 247 S.W.2d 169 (Tex. Civ. App. – Dallas 1952, writ ref'd n.r.e.), the court ruled that an exclusive sale agreement between an Ohio margarine supplier and a Texas retailer, even though it affected intrastate commerce, was not reached by the Texas antitrust statute because the contract itself was interstate. Here, WCS' only bid, to date, similarly relates to a facility in Ohio.

WCS' reliance on *Pounds Photographic Labs v. Noritsu America Corp.*, 818 F.2d 1219 (5th Cir. 1988), and *Elray, Inc. v. Cathodic Protection Service*, 507 S.W.2d 570 (Tex. Civ. App. – Houston [14th Dist.] 1974, no writ), in an unavailing attempt to establish an intrastate component to its claims. In *Pounds Photographic* the court's finding of an intrastate component to the plaintiff's antitrust claims was based on evidence the defendant had "imposed a restriction on the movement of a QSS unit from El Paso to Austin, clearly an impediment to intrastate commerce." *Id.* at 1224. *Elray, Inc.* is even less helpful to WCS. There, the court held that the Texas antitrust statute could be applied to an anticompetitive agreement made in Texas between a Texas partnership and a Texas corporation. That holding is inapplicable to this case in which WCS has, in the First Amended Petition, defined itself as a federal government contractor in a wholly interstate market.

DEFENDANTS' REMOVAL WAS TIMELY

WCS argues that Defendants' removal was untimely, claiming that WCS' Original Petition and other papers

available more than 30 days prior to the date of removal put Defendants' on notice that WCS' antitrust claims involved the interstate disposal of DOE nuclear waste. *Motion to Remand* 7-9.[8] WCS' argument focuses on the wrong issue. As WCS asserts, Defendants have known all along that WCS' claims were based at least in part on the interstate market for the disposal of DOE wastes. The element that made removal possible, and that was not clarified until the First Amended Petition was filed, was that WCS' claims are now based *exclusively* on the interstate DOE market and do not involve any private, intrastate nuclear waste disposal market that would have been sufficient to state antitrust claims under Texas law.[9] WCS presents no evidence that Defendants were aware of this critical fact prior to the filing of the First Amended Petition.

At the very most, the Original Petition and WCS' other papers of which Defendants were aware prior to March 13, 1998 were ambiguous regarding the relevant market on which WCS' claims were based. The Fifth Circuit has held that pleadings that are indeterminate

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[8] WCS also incorrectly accuses Defendants of seeking to delay the disposition of this case by removing it. This allegation is baseless. Defendants have offered to seek to continue ongoing discovery after the removal by appropriate requests to this Court, but WCS declined. Further, there is no reason to believe that this Court cannot or will not proceed as expeditiously as the state court.

[9] Arguably, this critical point was not made completely clear by WCS until even later, at the April 3, 1998 state court hearing, where WCS' lawyers stated that DOE was the only customer relevant to their lawsuit. *See* Appendix, Tab 1.

with regard to removal jurisdiction do not put a defendant on notice to inquire into removability and start the 30-day clock running. *Leffall v. Dallas I.S.D.*, 28 F.3d 521, 525 (5th Cir. 1994); *Akin v. Big Three Indus., Inc.*, 851 F.Supp. 819, 825 (E.D. Tex. 1994). Defendants' removal was timely.

CONCLUSION AND PRAYER

In its First Amended Complaint, WCS asserts antitrust claims based solely on the interstate market for the disposal of low-level nuclear waste generated by DOE. Because the Texas antitrust statute does not reach these claims, the only relief available to WCS is under federal antitrust law, if at all. Because WCS attempted to artfully plead a federal antitrust action as an action under Texas antitrust law, Defendants' removal was proper. Accordingly, Defendants respectfully pray that this Court deny WCS' motion to remand and award Defendants any additional relief to which they may be justly entitled.

Respectfully submitted,

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